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1956

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1956.

Jan. 5. Sir (Francis) Raymond Evershed, *Master of the Rolls, created Baron Evershed of Stapenhill in the County of Derby.*

Jan. 5. The Hon. Sir Denis Gerrard, *a Justice of Her Majesty's High Court of Justice, Queen's Bench Division, resigned, owing to ill-health.*

Jan. 11. W. J. K. Diplock, Esq., Q.C., *was appointed to be one of the Justices of Her Majesty's High Court of Justice, Queen's Bench Division, and a knighthood was conferred upon him.*

Feb. 13. The Right Hon. Lord Porter, *sometime Lord of Appeal in Ordinary* (1938 *to* 1954), *died, aged* 79.

Feb. 20. The Right Hon. Sir Travers Humphreys, *sometime a Justice of Her Majesty's High Court of Justice, Queen's Bench Division, died, aged* 88.

Dec. 22. The Right Hon. Lord Roche, *sometime Lord of Appeal in Ordinary, died, aged* 85.

The Mode of Citation of the Volumes of the *Law Reports* for 1956, is as follows

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Aff. affirmed
Appl. applied
Appr. approved
C. considered
D. disapproved
Dist. distinguished
E. explained
F. followed
N.F. not followed
O. overruled
Q. questioned
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Rev. reversed

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Compania Naviera Maropan S/A *v.* Bowaters Lloyd Pulp and Paper Mills Ltd. (The Stork)	[1955] 2 Q.B. 68; [1955] 2 W.L.R. 998; [1955] 2 All E.R. 241	*Appr.*	267, 282
Comptoir Commercial Anversois and Power, Son & Co., *In re*	[1920] 1 K.B. 868; 36 T.L.R. 101		710
Comyn *v.* Attorney-General	[1950] I.R. 142	*R.*	202, 210
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Cooper *v.* Stubbs	[1925] 2 K.B. 753; 41 T.L.R. 614	*C.*	15, 28, 30, 34, 35, 38
Cornish Mutual Assurance Co. Ltd. *v.* Inland Revenue Commissioners	[1926] A.C. 281	*R.*	78
Cotter *v.* National Union of Seamen	[1929] 2 Ch. 58; 45 T.L.R. 352		119
Cotton's Case	Godb. 191		427
Countess, The	[1921] P. 279; 37 T.L.R. 594; [1922] P. 41; 38 T.L.R. 218; [1923] A.C. 345; 39 T.L.R. 302	*R.*	10
Cowan, *Ex p.*	L.R. 2 Ch. 563	*R.*	757
Cowley (Earl) *v.* Inland Revenue Commissioners	[1899] A.C. 198; 15 T.L.R. 270	*R.*	344
Cowley (Earl) *v.* Inland Revenue Commissioners	[1899] A.C. 198; 15 T.L.R. 270	*C.*	492, 500
Cowley's (Earl) Estate, *In re*	[1898] 1 Q.B. 355	*R.*	344
Craddock *v.* Zevo Finance Co. Ltd.	27 T.C. 267		90
Craven *v.* Commissioners of Stamp Duties	[1948] N.Z.L.R. 550	*C.*	391, 403
Cunard *v.* Antifyre Ltd.	[1933] 1 K.B. 551; 49 T.L.R. 184	*R.*	224
Cunningham *v.* Dunn	3 C.P.D. 443		600
Currie *v.* Inland Revenue Commissioners	[1921] 2 K.B. 332; 37 T.L.R. 371	*R.*	32, 34
Dageid, The	80 Ll.L.Rep. 517	*R.*	231
Dahl *v.* Nelson	6 App.Cas. 38	*R.*	728
Daniel *v.* Gracie	6 Q.B. 145		174
Dapueto *v.* Wyllie & Co.	L.R. 5 P.C. 482		306
Dashwood *v.* Dashwood	[1927] W.N. 276		410
Davies *v.* Adelaide Chemical and Fertilizer Co. Ltd.	[1947] S.A.S.R. 67	*R.*	200
Davis Contractors Ltd. *v.* Fareham U. D. C.	[1955] 1 Q.B. 302; [1955] 1 All E.R. 275	*Aff.*	697
Deacon *v.* Grimshaw	93 C.L.R. 83	*R.*	538
Dean *v.* Hiesler	[1942] 2 All E.R. 340		52
Dee Conservancy Board *v.* McConnell	29 Ll.L.Rep. 181; [1928] 2 K.B. 159	*Dist.*	2
Deering *v.* Bank of Ireland	12 App.Cas. 20		292
Demetriades *v.* Glasgow Corporation	[1951] 1 T.L.R. 396; [1951] 1 All E.R. 457	*R.*	771

Denny, Mott & Dickson Ltd. *v.* James B. Fraser & Co. Ltd.	[1944] A.C. 265; 60 T.L.R. 419; [1944] 1 All E.R. 678	*R.*	719, 720, 729
Dent *v.* Commissioner of Stamp Duties	9 C.L.R. 406		518
Dillet, *In re*	12 App.Cas. 459		258
Direct U.S. Cable Co. *v.* Western Union Telegraph Co.	[1921] 1 Ch. 370; 36 T.L.R. 402		543
Djabartey *v.* Benkumhene Antwi Awua II	4 W.A.C.A. 202		410
Dominion Taxi-cab Association *v.* Minister of National Revenue	[1954] S.C.R. 82		94
Dorin *v.* Dorin	L.R. 7 H.L. 568	*R.*	311
Dublin Corporation *v.* M'Adam	20 L.R.Ir. 497; 2 T.C. 387	*R.*	68, 74, 78
Ducker *v.* Rees Roturbo Development Syndicate Ltd.	[1928] A.C. 132; 44 T.L.R. 307		27
Duffy, *In re*, Lakeman *v.* Attorney-General	[1949] Ch. 28; 64 T.L.R. 545; [1948] 2 All E.R. 756		290
Dummelow, *In re*, *Ex p.* Ruffle	L.R. 8 Ch. 997		289
Duncan *v.* Köster (The Teutonia)	L.R. 4 P.C. 171	*R.*	612
Dutton *v.* Sneyd Bycars Co. Ltd.	[1920] 1 K.B. 414		366
Ebbs *v.* James Whitson & Co. Ltd.	[1952] 2 Q.B. 877; [1952] 1 T.L.R. 1428; [1952] 2 All E.R. 192		618
Edmonds *v.* Foster	45 L.J.M.C. 41		53
Edwards *v.* Attorney-General for Canada	[1930] A.C. 124; 46 T.L.R. 4	*R.*	346
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Edwards *v.* National Coal Board	[1949] 1 K.B. 704; 65 T.L.R. 430; [1949] 1 All E.R. 743		651
Egan *v.* Langham Investments Co. Ltd.	[1938] 1 K.B. 667; 54 T.L.R. 268; [1938] 1 All E.R. 193		542
Ekuah Mansah *v.* Kofi Ambradu	7 W.A.C.A. 204		508
Ella, The	[1915] P. 111; 30 T.L.R. 566		6
Equity Trustees Executors and Agency Co. Ltd. *v.* Federal Commissioner of Taxation	55 C.L.R. 459		292
Errington *v.* Metropolitan District Railway Co.	19 Ch.D. 559		745
Esso Petroleum Co. Ltd. *v.* Southport Corporation	[1956] A.C. 218; [1955] 3 All E.R. 864	*R.*	639
Fairholme *v.* Firth & Brown Ltd.	149 L.T. 332; 49 T.L.R. 470	*C.*	186, 198–200, 205
Farmer *v.* Scottish North American Trust Ltd.	[1912] A.C. 118; 28 T.L.R. 142		89
Federal Commissioner of Taxation *v.* Adelaide Electric Supply Co. Ltd.	83 C.L.R. 413		379
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Fletcher *v.* Rylands	L.R. 1 Ex. 265	*R.*	226
Flower *v.* Ebbw Vale Steel, Iron and Coal Co. Ltd.	[1934] 2 K.B. 132; [1936] A.C. 206	*R.*	647
Foss *v.* Harbottle	2 Hare 461		119
Fraser (D. R.) & Co. Ltd. *v.* Minister of National Revenue	[1949] A.C. 24		466
Gallagher *v.* Balfour Beatty & Co. Ltd.	1951 S.C. 712	*R.*	557, 558, 570, 571
Galloway *v.* Galloway	[1954] P. 312; [1954] 2 All E.R. 143	*Rev.*	300
Gatehouse *v.* John Summers & Sons Ltd.	[1953] 1 W.L.R. 742; [1953] 2 All E.R. 117	*R.*	660
Gayler & Pope Ltd. *v.* Davies (B.) & Son Ltd.	[1924] 2 K.B. 75; 40 T.L.R. 591	*R.*	226, 245
General Accident Fire and Life Assurance Corporation Ltd. *v.* McGowan	[1908] A.C. 207; 24 T.L.R. 533		90
General Cleaning Contractors Ltd. *v.* Christmas	[1953] A.C. 180; [1952] 2 All E.R. 1110		554, 637
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Gibson *v.* Barton	L.R. 10 Q.B. 329		52
Glasgow Corporation *v.* Muir	[1943] A.C. 448; 59 T.L.R. 266; [1943] 2 All E.R. 44	*R.*	561, 568, 634
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Glenboig Union Fireclay Co. *v.* Inland Revenue	1922 S.C. 112; 12 T.C. 427		66
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Graham *v.* Green	[1925] 2 K.B. 37; 41 T.L.R. 371		26
Grant *v.* National Coal Board	1955 S.L.T. 287	*Rev.*	649
Grant *v.* Sun Shipping Co. Ltd.	[1948] A.C. 549; [1948] 2 All E.R. 238		637
Great Western Railway Co. *v.* Mostyn (Owners)	[1928] A.C. 57; 44 T.L.R. 179	*R.*	10
Green *v.* Green	[1929] P. 101; 45 T.L.R. 7	*R.*	314, 321, 322, 325, 329
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Hangkam Kwingtong Woo *v.* Liu Lan Fong	[1951] A.C. 707; [1951] 2 T.L.R. 442; [1951] 2 All E.R. 567		706
Harding *v.* Commissioners of Stamps for Queensland	[1898] A.C. 769; 14 T.L.R. 488	*R.*	341
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Horlock *v.* Beal	[1916] 1 A.C. 486; 32 T.L.R. 251	*R.*	720
Howard *v.* Gosset	10 Q.B. 359		411
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Inland Revenue Commissioners *v.* Fraser	1942 S.C. 493; 24 T.C. 498	*C.*	15, 31, 35
Inland Revenue Commissioners *v.* Gardner, Mountain & D'Ambrumenil Ltd.	29 T.C. 69		91
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Inland Revenue Commissioners *v.* Reinhold	1953 S.C. 49; 34 T.C. 389	*R.*	28
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James *v.* Commonwealth of Australia	[1936] A.C. 578; 52 T.L.R. 696; [1936] 2 All E.R. 1449	*R.*	537
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Joseph Constantine Steamship Line Ltd. *v.* Imperial Smelting Corporation	[1942] A.C. 154; 57 T.L.R. 485; [1941] 2 All E.R. 165		599
Jubilee Cotton Mills Ltd., *In re*	[1922] 1 Ch. 100; 38 T.L.R. 891		543
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M'Daid *v.* Clyde Navigation Trustees	1946 S.C. 462	*R.*	199–202, 205–207
Mahadeo *v.* The King	[1936] 2 All E.R. 813; [1936] W.N. 203		479
Mahbub Shah *v.* King-Emperor	L.R. 72 I.A. 148		480
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Makein, *In re*	[1955] Ch. 194; [1955] 1 All E.R. 57	*R.*	311
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Maritime National Fish Ltd. *v.* Ocean Trawlers Ltd.	[1935] A.C. 524		705
Martin *v.* Lowry	[1926] 1 K.B. 550; 42 T.L.R. 233; [1927] A.C. 312; 43 T.L.R. 116		21
Mason, *In re*	[1928] Ch. 385; 44 T.L.R. 225		543
Massachusetts Hospital *v.* Provincial Insurance Co.	25 U.C.R. (Q.B.) 613		377
Mayor of Doncaster *v.* Day	3 Taunt. 262		478
Mediana (Owners) *v.* Comet (Owners)	[1900] A.C. 113; 16 T.L.R. 194		192
Mensah *v.* Cobbina	5 W.A.C.A. 108		409
Merchant Prince, The	[1892] P. 179; 8 T.L.R. 430	*Dist.*	219, 228–232, 236, 237, 240, 242, 244
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Metcalfe *v.* Britannia Ironworks Co.	2 Q.B.D. 423		275
Metropolitan Borough of Battersea *v.* British Iron and Steel Research Association	[1949] 1 K.B. 434; 65 T.L.R. 183		249

Metropolitan Railway Co. *v.* Wright	11 App.Cas. 152; 2 T.L.R. 553		52
Metropolitan Water Board *v.* Dick, Kerr & Co. Ltd.	[1918] A.C. 119; 34 T.L.R. 113		705
Millie, The	[1940] P. 1; 55 T.L.R. 972	*Appr.*	2, 10, 12
Minister of Health *v.* Rex	[1930] 2 K.B. 98; 46 T.L.R. 178; [1931] A.C. 494; 47 T.L.R. 337		744
Minister of National Revenue *v.* Anaconda American Brass Ltd.	[1954] S.C.R. 737	*Rev.*	87
Minister of National Revenue *v.* Wrights' Canadian Ropes Ltd.	[1947] A.C. 109	*R.*	474
Mist *v.* Toleman & Sons	62 T.L.R. 131; [1946] 1 All E.R. 139	*R.*	620, 624
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Mixt Moneys, Case de	Davies's Rep. 48		374
Moffat *v.* Sheppard	9 C.L.R. 265		176
Montgomerie & Co. Ltd. *v.* Wallace-James	[1904] A.C. 73	*R.*	559
Morelle Ltd. *v.* Wakeling	[1955] 2 Q.B. 379; [1955] 1 All E.R. 708	*C.*	422, 441, 445, 448, 455, 458
Morelle Ltd. *v.* Waterworth	[1955] 1 Q.B. 1; [1954] 2 All E.R. 673	*D.*	422, 435, 445, 455, 456
Morris *v.* Davies	5 Cl. & F. 163, 243		584
Morris *v.* West Hartlepool Steam Navigation Co. Ltd.	[1954] 2 Lloyd's Rep. 507	*Rev.*	553
Morton *v.* William Dixon Ltd.	1909 S.C. 807	*R.*	557, 558, 568, 570, 578
Mount Albert Borough Council *v.* Australasian Temperance and General Mutual Life Assurance Society	[1938] A.C. 224; 54 T.L.R. 5; [1937] 4 All E.R. 206		373
Mount Albert Borough Council *v.* Australasian Temperance and General Mutual Life Assurance Society	[1938] A.C. 224; 54 T.L.R. 5; [1937] 4 All E.R. 206		592
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Nance *v.* British Columbia Electric Railway Co. Ltd.	[1951] A.C. 601; [1951] 2 T.L.R. 137; [1951] 2 All E.R. 448	*R.*	648
National Association of Local Government Officers *v.* Watkins	18 T.C. 499		64
National Bank of Australasia Ltd. *v.* Scottish Union and National Insurance Co.	84 C.L.R. 177; [1952] A.C. 493; [1952] 2 T.L.R. 254	*C.*	370, 387
National Mutual Life Association of Australasia Ltd. *v.* Attorney-General for New Zealand	[1954] N.Z.L.R. 754	*Aff.*	370
National Union of General and Municipal Workers *v.* Gillian	[1946] K.B. 81; 62 T.L.R. 46; [1945] 2 All E.R. 593	*Appr.*	105, 127, 130, 131, 142, 143, 152
Naval Colliery Co. Ltd. *v.* Inland Revenue Commissioners	12 T.C. 1017		90
Neal, *Ex p.*, *In re* Batey	14 Ch.D. 579		289
Nelungaloo Proprietary Ltd. *v.* Commonwealth of Australia	[1951] A.C. 34		177
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Nevill *v.* Inland Revenue Commissioners	[1924] A.C. 385; 40 T.L.R. 341	*R.*	500
New Brunswick Railway Co. *v.* British and French Trust Corporation	[1939] A.C. 1; [1938] 4 All E.R. 747		179
Newcastle and Hunter River Steamship Co. Ltd. *v.* Attorney-General for the Commonwealth	29 C.L.R. 357	*Dist.*	334, 356
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New Zealand Shipping Co. Ltd. *v.* Société des Ateliers et Chantiers de France	[1919] A.C. 1; 34 T.L.R. 400		705
Nicholls *v.* Ely Beet Sugar Factory	[1931] 2 Ch. 84	*R.*	225
Nicholls *v.* F. Austin (Leyton) Ltd.	[1946] A.C. 493; 62 T.L.R. 320; [1946] 2 All E.R. 92	*R.*	656, 661
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Oakes *v.* Commissioner of Stamp Duties of New South Wales	[1954] A.C. 57; [1953] 2 All E.R. 1563		517
O'Connor *v.* Commissioner of Succession Duties (S.A.)	47 C.L.R. 601	*Appr.*	513, 526
O'Driscoll *v.* Manchester Insurance Committee	[1915] 3 K.B. 499; 31 T.L.R. 532		290
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Osborne *v.* Amalgamated Society of Railway Servants	[1909] 1 Ch. 163	*R.*	142, 152
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Pacific Coal Co. Pty. Ltd. *v.* Perpetual Trustee Co. (Ltd.)	91 C.L.R. 486	*Aff.*	166
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Parkinson (Sir Lindsay) & Co. Ltd. *v.* Commissioners of Works	[1949] 2 K.B. 632; [1950] 1 All E.R. 208	*R.*	721, 723, 735
Paris *v.* Stepney Borough Council	[1951] A.C. 367; [1951] 1 T.L.R. 25; [1951] 1 All E.R. 42	*Appl.*	553, 557, 558, 568, 570, 571, 578, 635
Parkfield Trust Ltd. *v.* Dent	[1931] 2 K.B. 579		543
Partabmull Rameshwar *v.* K. C. Sethia (1944) Ltd.	[1951] W.N. 389; [1951] 2 Lloyd's Rep. 89		594
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Patrick *v.* Broadstone Mills Ltd.	[1954] 1 W.L.R. 158; [1954] 1 All E.R. 163	*Appl.*	87, 103
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Pearn *v.* Miller	11 T.C. 610		21
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Pidoto *v.* State of Victoria	68 C.L.R. 87	*R.*	342
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Powell *v.* Streatham Manor Nursing Home	[1935] A.C. 243; 51 T.L.R. 289		554
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Rex *v.* Minister of Health, *Ex p.* Davis	[1929] 1 K.B. 619; 45 T.L.R. 345		744
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Robinson *v.* Ommanney	21 Ch.D. 780		292
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Weiss *v.* State Life Insurance Co.	[1935] S.C.R. (Can.) 461		378
Wernher *v.* Inland Revenue Commissioners	[1942] 1 K.B. 399		63
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Westminster Bank Ltd. *v.* Inland Revenue Commissioners	[1954] 1 W.L.R. 242; [1954] 1 All E.R. 240		290
Westminster Corporation *v.* London and North Western Railway Co.	[1905] A.C. 426; 21 T.L.R. 686		740
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Whitley *v.* Stumbles	[1930] A.C. 544; 46 T.L.R. 555		693
Wilkinson *v.* Adam	1 Ves. & B. 422	*R.*	316
Wilkinson *v.* Barking Corporation	[1948] 1 K.B. 721; 64 T.L.R. 230; [1948] 1 All E.R. 564		746
Wilsons and Clyde Coal Co. Ltd. *v.* English	[1938] A.C. 57; 53 T.L.R. 944; [1937] 3 All E.R. 628	*R.*	616
Winans *v.* Attorney-General	[1910] A.C. 27; 26 T.L.R. 133	*C.*	333, 353, 354
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Wiseman, *Ex p.*, *In re* Kelson, Tritton & Co.	L.R. 7 Ch. 35		292
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Workington Harbour and Dock Board *v.* Towerfield (Owners)	[1951] A.C. 112; 66 T.L.R. (Pt. 2) 387; [1950] 2 All E.R. 414	*R.*	11–13
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STATUTES JUDICIALLY CONSIDERED

1279

Statute De Viris Religiosis, 1279 (7 *Edw.* 1, *stat.* 2, *c.* 1) - - **H.L.(E.) 421**

1843

Scientific Societies Act, 1843 (6 *&* 7 *Vict. c.* 36), *s.* 1 - - **H.L.(E.) 245**

1847

Harbours, Docks and Piers Clauses Act, 1847 (10 *&* 11 *Vict. c.* 27), *s.* 74 **H.L.(E.) 1**

1871

Trade Union Act, 1871 (34 *&* 35 *Vict. c.* 31) **H.L.(E.) 104**

1888

Mortmain and Charitable Uses Act, 1888 (51 *&* 52 *Vict. c.* 42), *s.* 1 (1) **H.L.(E.) 421**

1891

Mortmain and Charitable Uses Act, 1891 (54 *&* 55 *Vict. c.* 73), *s.* 3 - **H.L.(E.) 421**

1894

Finance Act, 1894 (57 *&* 58 *Vict. c.* 30), *ss.* 1, 2, 7 (5) - - - **H.L.(E.) 491**

Merchant Shipping Act, 1894 (57 *&* 58 *Vict. c.* 60), *s.* 503 - - **H.L.(E.) 1**

1897

Manchester Ship Canal Act, 1897 (60 *&* 61 *Vict. c. cviii*), *s.* 9 - **H.L.(E.) 1**

1900

Commonwealth of Australia Constitution Act, 1900 (63 *&* 64 *Vict. c.* 12), *s.* 92 **J.C. 527**

Merchant Shipping (Liability of Shipowners and Others) Act, 1900 (63 *&* 64 *Vict. c.* 32), *ss.* 1, 3 - - **H.L.(E.) 1**

1911

Coal Mines Act, 1911 (1 *&* 2 *Geo.* 5, *c.* 50), *s.* 49 - - - **H.L.(Sc.) 649**

1918

Income Tax Act, 1918 (8 *&* 9 *Geo.* 5, *c.* 40), *s.* 37 (1) - - - **H.L.(E.) 39**

—— —— *Sch. D, Case I* - - **H.L.(E.) 14**

—— —— *Sch. D, Case I* - - **H.L.(E.) 58**

1924

Housing (Financial Provisions) Act, 1924 (14 *&* 15 *Geo.* 5, *c.* 35), *s.* 3 (2) (*c*) **H.L.(Sc.) 670**

1925

Land Registration Act, 1925 (15 *Geo.* 5, *c.* 21), *s.* 23 (1) - - - **H.L.(E.) 421**

1936

Manchester Ship Canal Act, 1936 (26 *Geo.* 5 *&* 1 *Edw.* 8, *c. cxxiv*), *s.* 32 (1) (2) **H.L.(E.) 1**

1940

Finance Act, 1940 (3 *&* 4 *Geo.* 6, *c.* 29), *s.* 55 **H.L.(E.) 491**

1946

Acquisition of Land (Authorization Procedure) Act, 1946 (9 *&* 10 *Geo.* 6, *c.* 49), *Sch. I, Pt. IV, paras.* 15, 16 **H.L.(E.) 736**

1950

Matrimonial Causes Act, 1950 (14 *Geo.* 6, *c.* 25), *s.* 26 (1) - - **H.L.(E.) 299**

AUSTRALIA

1902

Constitution Act, 1902 (*New South Wales*) (*No.* 32 *of* 1902), *s.* 5 - **J.C. 331**

1920

Stamp Duties Act, 1920–1946 (*N.S.W.*), *s.* 102 (2) (*d*) - - - - **J.C. 512**

—— —— *ss.* 102 (2) (*g*), 102 (2A), 144 **J.C. 331**

1931

State Transport (Co-ordination) Act, 1931–1951 (*N.S.W.*) - - - - **J.C. 527**

1932

Landlord and Tenant (Amendment) Act, 1932–1947 (*New South Wales*), *s.* 15 (1) **J.C. 165**

1954

State Transport Co-ordination (Barring of Claims and Remedies) Act, No. 45 *of* 1954 (*N.S.W.*), *ss.* 3, 4, 5 **J.C. 527**

CANADA

1940

Excess Profits Tax Act, 1940, *c.* 32, *s.* 3 **J.C. 85**

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1921

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—— *s.* 9 (1) (2) (*d*) - - **J.C. 284**

1948

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STATUTORY RULES, ORDERS AND INSTRUMENTS JUDICIALLY CONSIDERED

Grinding of Metals (*Miscellaneous Industries*) *Regulations*, 1925 (*S.R. & O.*, 1925, *No.* 904), *reg.* 1 - **H.L.(Sc.) 613**

AUSTRALIA

National Security (*Prices*) *Regulations* (*August* 22, 1940) (*made under the National Security Act*, 1939–1940 (*Commonwealth*)), *regs.* 3, 23 (2) - **J.C. 165**

Prices Regulation Order No. 985 (*March* 18, 1943), *para.* 2 (*c*) - - **J.C. 165**

ORDINANCES JUDICIALLY CONSIDERED

BRITISH GUIANA

Criminal Law (*Procedure*) *Ordinance* (*Laws of British Guiana*, 1930, *c.* 18), *ss.* 44, 167 (2) - - - - **J.C. 256**

CEYLON

Evidence Ordinance (*Legislative Enactments of Ceylon*, 1938 *Rev.*, *c.* 11), *s.* 112 **J.C. 580**

HONG KONG

Landlord and Tenant Ordinance (*Hong Kong*), *No.* 25 *of* 1947, *s.* 3 (1) (*a*) **J.C. 358**

MALAYA

Income Tax Ordinance, *No.* 48 *of* 1947 *of the Federation of Malaya* (*as amended by the Income Tax* (*Amendment*) *Ordinance*, *No.* 6 *of* 1951), *ss.* 39 (*a*), *proviso*, 75 (1) - - - **J.C. 459**

WEST AFRICA

Moneylenders Ordinance (*Consolidated Ordinances of Nigeria*, *c.* 136), *s.* 19 **J.C. 539**

West African Court of Appeal Ordinance (*Laws of Nigeria*, 1948, *c.* 229), *ss.* 10, 11 (1) - - - - **J.C. 49**

WEST AFRICA (GOLD COAST)

Courts Ordinance (*Laws of the Gold Coast*, 1936 *Rev.*, *c.* 4), *ss.* 14, 17 (*b*); 3*rd Sch.*, *Ords.* 41, *r.* 1, 43, *r.* 26 **J.C. 404**

Native Courts (*Ashanti*) *Ordinance* (*Laws of the Gold Coast*, 1936 *Rev.*, *c.* 80), *ss.* 7, 35; 1*st Sch.* - - **J.C. 404**

Native Courts (*Colony*) *Ordinance*, 1945 (*Laws of the Gold Coast*, 1951, *c.* 98), *ss.* 13, 46 - - - - - **J.C. 501**

ERRATUM

P. 329, footnote 56. *For* [1909] *read* [1908].

Appeal Cases
BEFORE
THE HOUSE OF LORDS
(ENGLISH—IRISH—AND SCOTTISH)
AND
THE JUDICIAL COMMITTEE
OF
HER MAJESTY'S MOST HONOURABLE
PRIVY COUNCIL

[HOUSE OF LORDS.]

STONEDALE No. 1 (OWNERS) . . . APPELLANTS;

AND

MANCHESTER SHIP CANAL CO. AND OTHERS RESPONDENTS.

H. L. (E.)*

1955
May 23, 24;
June 23.

Shipping—Limitation of liability—Expenses of raising vessel—Whether "injury or damage"—Harbours and docks—Obstruction to navigation of canal by sunken barge—No physical damage or injury to harbour works—Liability of barge owners for expenses incurred by canal company in removing obstruction—Whether right to limit liability—Harbours, Docks and Piers Clauses Act, 1847 (10 *&* 11 *Vict. c.* 27), *s.* 74*—Merchant Shipping Act,* 1894 (57 *&* 58 *Vict. c.* 60), *s.* 503*—Merchant Shipping (Liability of Shipowners and Others) Act,* 1900 (63 *&* 64 *Vict. c.* 32), *ss.* 1, 3*—Manchester Ship Canal Act,* 1897 (60 *&* 61 *Vict. c. cviii*), *s.* 9*—Manchester Ship Canal Act,* 1936 (26 *Geo.* 5 *&* 1 *Edw.* 8, *c. cxxiv*), *s.* 32 (1) (2).

Dock. Statute.

By section 9 of the Manchester Ship Canal Act, 1897: "The "owners of any vessel . . . which without actual fault or privity "of the owners shall cause any injury or damage to the portion "of the canal" (as therein defined) "or to the banks, locks or "works comprised in such portion shall not be liable in respect of

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* *Present*: VISCOUNT SIMONDS, LORD MORTON OF HENRYTON, LORD TUCKER, LORD KEITH OF AVONHOLM and LORD SOMERVELL OF HARROW.

"such injury or damage to an amount exceeding eight pounds for "every registered ton of such vessel."

By section 1 of the Merchant Shipping (Liability of Shipowners and Others) Act, 1900: "The limitation of the liability "of the owners of any ship set by section 503 of the Merchant "Shipping Act, 1894, in respect of loss of or damage to vessels, "goods, merchandise, or other things, shall extend and apply to "all cases where (without their actual fault or privity) any loss "or damage is caused to property or rights of any kind, whether "on land or on water, or whether fixed or movable, by reason "of the improper navigation or management of the ship." By section 3: "The limitation of liability under this Act . . . shall "apply whether the liability arises at common law or under any "general or private Act of Parliament, and notwithstanding any"thing contained in such Act."

By section 32 of the Manchester Ship Canal Act, 1936: "(1) Whenever any vessel is sunk stranded or abandoned in part "of (*a*) any river canal waterway navigable channel lock or dock "forming part of the harbour or port of Manchester or of the "undertaking . . . the company may . . . cause the vessel to be "raised or removed. . . . (2) The company may recover from "the owner of any such vessel all expenses incurred . . . in con"nexion with that vessel. . . ."

The owners of a barge sunk in the Manchester Ship Canal claimed to be entitled to limit their liability in respect of the expenses incurred by the canal company in raising and removing it. It was agreed that the sinking was caused by the improper navigation of the barge, but without the owners' fault or privity:—

Held, (1) that sections 1 and 3 of the Act of 1900 did not enable owners to limit their liability except where it lay in damages; (2) that section 32 of the Act of 1936 conferred on the canal company a right to recover the expenses of raising a sunken vessel as a debt and not as damages; and (3) that accordingly this liability could not be limited under the Act of 1900.

Held, further, that the "injury or damage" referred to in section 9 of the Act of 1897 was physical damage to physical things and did not include loss suffered by the undertakers in respect of their undertaking in consequence of that damage.

Per Lord Tucker, Lord Keith of Avonholm and Lord Somervell of Harrow. *Quaere* whether obstruction caused by the sinking of a vessel may amount to physical injury or damage to the canal.

Dee Conservancy Board v. *McConnell* [1928] 2 K.B. 159 distinguished.

The Millie [1940] P. 1; 55 T.L.R. 972 approved.

Decision of the Court of Appeal [1954] P. 338; [1954] 2 All E.R. 170 affirmed.

APPEAL from the Court of Appeal (Singleton, Jenkins and Hodson L.JJ.).

This was an appeal from a judgment of the Court of Appeal dated April 13, 1954, by which the court unanimously dismissed the appeal by the appellants, Richard Abel & Sons, Ld., the owners of the dumb barge *Stonedale No. 1*, and affirmed the judgment of Willmer J. dated July 31, 1953, by which he pronounced (inter alia) that the appellants (the plaintiffs in the action) were not entitled to limit their liability in respect of the claim by the respondents, Manchester Ship Canal Co. and all persons claiming to have sustained damage or loss by reason of the sinking of the *Stonedale No. 1* in the Manchester Ship Canal and the consequences thereof (the defendants in the action) for the expenses incurred by them in connexion with the raising, removing, marking, lighting, watching and otherwise controlling the wreck of the *Stonedale No. 1*.

The facts, stated by Viscount Simonds, were as follows: On February 14, 1952, the *Stonedale No. 1* was in tow of the appellants' steam tug *Warrendale* in the Manchester Ship Canal and in the course of the towage grounded in the vicinity of Hooton Wharf and sank and became an obstruction in the fairway to vessels navigating therein. It was agreed that the sinking was caused by the improper navigation of the *Stonedale No. 1* and of the *Warrendale* by the servants of the appellants but without the actual fault or privity of the appellants.

The appellants at once got into communication with the respondents, the Manchester Ship Canal Co., as a result of which the respondents undertook to raise the sunken vessel. The respondents relied on the contention that the effect of these communications was to create a contractual liability in the appellants, if their other pleas should fail.

The respondents, having at their own cost raised the ship, made a claim against the appellants for the expenses they had incurred amounting to £7,609 1s. 4d. This they claimed to be entitled to do under section 32 of the Manchester Ship Canal Act, 1936, which provided that: " (1) Whenever any vessel is sunk stranded " or abandoned in part of—(*a*) any river canal waterway navigable " channel lock or dock forming part of the harbour and port of " Manchester or of the undertaking . . . the company may if they " think fit cause the vessel to be raised or removed . . . in such " manner as to clear such river canal waterway navigable channel " lock dock or area therefrom. (2) The company may recover from " the owner of any such vessel all expenses incurred by the " company under this section in connexion with that vessel . . . " either summarily as a civil debt or as a debt in any court of " competent jurisdiction. Provided always that the company " may if they think fit and shall if so required by the owner of "the vessel cause such vessel . . . to be sold in such manner as "they think fit and out of the proceeds of the sale may . . . "reimburse themselves for any such expenses and shall hold the "surplus if any of those proceeds in trust for the persons entitled "thereto and in case such proceeds shall be insufficient to "reimburse the company such expenses the deficiency may be "recovered by the company in manner aforesaid."

The appellants, faced by this claim which they were not prepared to admit, did not await the proceedings which the respondents might have commenced for recovery of the sum in question as a debt, but themselves commenced an action against the respondents in which they claimed to limit their liability to them and "all persons claiming to have suffered loss or damage "by reason of the sinking of the *Stonedale No. 1* in the Manchester Ship Canal and the consequences thereof." They founded their claim on the provisions of sections 1 and 3 of the Merchant Shipping Act, 1900, or, alternatively, on those of section 9 of the Manchester Ship Canal Act, 1897. If the claim was well-founded the amount for which the appellants would be liable, based on the combined tonnage of the *Stonedale No. 1* and the *Warrendale*, was £1,681 2s. 6d. with some interest.

K. S. Carpmael Q.C. and *P. T. Bucknill* for the appellants. Under section 504 of the Merchant Shipping Act, 1854, the limitation of the shipowner's liability envisaged by that section was expressed as "the value of his ship and the freight." By section 54 of the Merchant Shipping Amendment Act, 1862, he was not to be liable for an "amount exceeding £8 for each ton "of the ship's tonnage." The limitation has remained at that figure ever since, although it bears no relation to values at the present day. The limitation is now found in section 503 (1) (ii) of the Merchant Shipping Act, 1894. The liability of the owner of any ship for damage to harbour works was laid down by section 74 of the Harbours, Docks and Piers Clauses Act, 1847. The Merchant Shipping (Liability of Shipowners and Others) Act, 1900, represented a compromise between the shipowners and the dock interests. As to liability under the Act of 1847, see *River Wear Commissioners* v. *Adamson* [1] and *Great Western Railway Co.* v. *Mostyn (Owners)*.[2] There may be liability for damage to a dock though there is no negligence.

It would be anomalous if the effect of the decision of the present case were that while a shipowner could limit his liability where the claim against him arose out of negligence, he could not limit it where the claim was independent of negligence. Section 32 of the Manchester Ship Canal Act, 1936, a private Act of Parliament of the respondents, does not deprive the shipowners of their right to limit their liability in the case of claims for loss or damage to property or rights of any kind. It does not purport to override section 3 of the Merchant Shipping Act, 1900, or section 9 of the Manchester Ship Canal Act, 1897. It would be remarkable if an Act like the Act of 1936 should be held to give dock owners a new way of recovering their whole expenses, without saying anything about the earlier Acts. The words of section 1 of the Act of 1900 give the shipowners the widest grounds for limiting their liability for the negligent navigation or management of their ships by their servants against claims for loss or damage to property or rights of any kind. They include claims in respect of the cost of raising a wreck. There is nothing to show that the Act is not to apply to such a case as this. The Act of 1936 is to be construed strictly against the parties who promoted it. The questions arise: Does the Act of 1900 or the Act of 1936 prevail? Is there a conflict between them at all? But for *The Millie* [3] Willmer J. would have allowed the limitation. The Court of Appeal felt constrained by dicta of Scott L.J. in *Tyne Improvement Commissioners* v. *Armement Anversois Société Anonyme* (*The Brabo*) [4] to hold that the limitation did not apply to a claim in respect of the cost of raising a wreck. The court approached the matter in the wrong way. Section 1 of the Act of 1900, which is of the widest character, aimed at putting into one section all the liabilities in respect of which a shipowner was to be allowed to limit his liability. Much reliance is placed on the wording of section 3 of the Act. The Act covers all liabilities whether arising on claims in respect of tort or under a statute. Section 1 refers back to the Act of 1894 and the Act of 1900 was obviously intended to extend the right of limitation thereby conferred. The liability limited is not one for damages only but a liability, however arising.

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[1] (1877) 2 App.Cas. 743.

[2] [1928] A.C. 57; 44 T.L.R. 179.

The Countess [5] (in the House of Lords *Mersey Docks and Harbour Board* v. *Hay* [6]) is of great importance, and reliance is placed on the observations of the Earl of Birkenhead [7] as to the effect of the Act of 1900. See also the observations of Younger

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[3] [1940] P. 1; 55 T.L.R. 972.

[4] [1947] 2 All E.R. 363, 370.

[5] [1921] P. 279; 37 T.L.R. 594; (C.A.) [1922] P. 41; 38 T.L.R. 218.

[6] [1923] A.C. 345; 39 T.L.R. 302.

[7] [1923] A.C. 345, 354–5.

L.J. in the Court of Appeal.[8] Compare the terms of section 32 (2) of the Act of 1936 with the relevant enactment in that case, section 94 of the Mersey Dock Acts Consolidation Act, 1858. It is true that no limitation was claimed in respect of the expenses incurred in respect of the ship itself, but on the facts of the case there may have been reasons connected with questions of salvage: see the arguments of counsel before Duke P.,[9] and also *per* Lord Sterndale M.R. in the Court of Appeal.[10] See also section 7 of the Mersey Docks and Harbour Act, 1912, as to the Board's powers to deal with a wreck.

The expenses here in question are the direct consequence of the ship becoming an obstruction and are within the words of the Act of 1900, which should not be narrowly construed: see *The Athelvictor.*[11] *Dee Conservancy Board* v. *McConnell*[12] shows that the expenses of moving a wreck are a direct result of the ship becoming an obstruction. That case was not cited to Langton J. in *The Millie*[13] and if it had been he would have reached a different conclusion. See also *The Ella*[14] and *St. Just Steamship Co. Ld.* v. *Hartlepool Port and Harbour Commissioners.*[15]

Reliance is placed on section 9 of the Act of 1897, which applies to the present case. An obstruction to a canal is "damage" to it as contrasted with "injury." It is physical damage, whereas injury is equivalent to legal injury—"injuria." *Workington Harbour and Dock Board* v. *Towerfield (Owners)*[16] is not an authority against the appellants. The relevant word in the enactment there construed was "damage," whereas in section 9 the words are "injury or damage." The observations in the speeches[17] telling against the appellants' contentions were obiter.

As to the dictum of Scott L.J. in *Tyne Improvement Commissioners* v. *Armement Anversois Société Anonyme (The Brabo),*[18] it is not to be found in the official report sub nom. *The Brabo.*[19] Any reliance placed on these words should accordingly be discounted.

Bucknill following. As to the meaning of the words "cause "any injury or damage" in section 9 of the Act of 1897, some help may be derived from *The Chr. Knudsen.*[20] It is clear from this case that under section 22 of the Supreme Court of Judicature (Consolidation) Act, 1925, damage is done by a ship by sinking a barge in and obstructing a dock. So this barge did damage by sinking in and obstructing this canal. When one is dealing with a ship which has obstructed a canal, there may or may not be a question of loss of profits according as one can prove them: see *Dee Conservancy Board* v. *McConnell.*[21]

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[8] [1922] P. 41, 66–7.
[9] [1921] P. 279, 282–3.
[10] [1922] P. 41, 58–9.
[11] [1946] P. 42, 49–50, 51; 62 T.L.R. 12.
[12] (1927) 29 Ll.L.Rep. 181; (C.A.) [1928] 2 K.B. 159.
[13] [1940] P. 1.
[14] [1915] P. 111, 116; 30 T.L.R. 566.
[15] (1929) 34 Ll.L.Rep. 344, 348.
[16] [1951] A.C. 112; 66 T.L.R. (Pt. 2) 387; [1950] 2 All E.R. 414.
[17] [1951] A.C. 112, 148, 155, 161.
[18] [1947] 2 All E.R. 363, 370.
[19] [1948] P. 33; 63 T.L.R. 494.

J. V. Naisby Q.C. and *H. E. G. Browning*, for the respondents, were not called on to argue.

Their Lordships took time for consideration.

June 23. VISCOUNT SIMONDS, having stated the facts and the claim of the appellants, continued: The claim has been rejected by Willmer J., who felt constrained to follow a decision of Langton J. in *The Millie,*[1] though he clearly doubted its correctness, and by the Court of Appeal who, after a careful review of the relevant law, had no hesitation in affirming it. Your Lordships, I think, will be unanimous in taking the same view.

I will consider in turn the relevant provisions of the Merchant Shipping Acts and the Manchester Ship Canal Act, 1897.

The Merchant Shipping Act, 1900, is entitled "An Act to "amend the Merchant Shipping Act, 1894, with respect to the "liability of shipowners and others," and it is necessary to turn back to the Act of 1894. That Act by Part VIII dealt with the subject of the liability of shipowners, and I pause to observe that the right of a shipowner to limit his liability forms no part of our common law but is entirely the creature of statute and must be found within its four corners.

For our present purpose I need only refer to section 503 (1), which is so far as is relevant in these terms: "The owners of a "ship, British or foreign, shall not, where all or any of the follow-"ing occurrences take place without their actual fault or privity; "(that is to say,) (*a*) Where any loss of life or personal injury "is caused to any person being carried in the ship; (*b*) Where any "damage or loss is caused to any goods, merchandise, or other "things whatsoever on board the ship; (*c*) Where any loss of "life or personal injury is caused to any person carried in any "other vessel by reason of the improper navigation of the ship; "(*d*) Where any loss or damage is caused to any other vessel, or

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[20] [1932] P. 153, 155, 156; 48 T.L.R. 619.

[21] [1928] 2 K.B. 159, 166.

[1] [1940] P. 1; 55 T.L.R. 972.

"to any goods, merchandise, or other things whatsoever on board "any other vessel, by reason of the improper navigation of the "ship; be liable to damages beyond the following amounts." Then the amounts are set out and I need not recite them here.

My Lords, the vital words in this section to which, as it appears to me, insufficient regard was paid in the argument of the appellants, are "be liable to damages." The relief given to shipowners is in respect of their liability to damages and nothing else.

Part VIII of the Act of 1894 has been from time to time amended, but the only material amendment is in the Act of 1900 to which I have referred. That Act by section 1 provided as follows: "The limitation of the liability of the owners of any "ship set by section 503 of the Merchant Shipping Act, 1894, "in respect of loss of or damage to vessels, goods, merchandise, "or other things, shall extend and apply to all cases where (without their actual fault or privity) any loss or damage is caused "to property or rights of any kind, whether on land or on water, or "whether fixed or movable, by reason of the improper navigation or management of the ship." Section 3, upon which the appellants place some reliance, provided that: "The limitation "of liability under this Act shall relate to the whole of any losses "and damages which may arise upon any one distinct occasion, "although such losses and damages may be sustained by more "than one person, and shall apply whether the liability arises at "common law or under any general or private Act of Parliament, "and notwithstanding anything contained in such Act."

My Lords, undoubtedly the Act of 1900 provided a large extension of the relief given to shipowners by the Act of 1894 but, until I heard it argued, I did not think it arguable that the relief extended so far as to enable shipowners to limit their liability except where their liability lay in damages. Nor has the argument of counsel convinced me to the contrary. The Act of 1900 is, as I have pointed out, an amending Act and its effect is to introduce into the body of section 503 of the earlier Act a new subject-matter, as it were a new paragraph (*e*) after paragraphs (*a*) to (*d*), in respect of which the shipowner shall not "be liable to "damages beyond the following amounts." Nor does section 3 of the Act of 1900 carry the matter any further, for its reference to the "liability under this Act" and to the "liability" arising at common law or under any Act of Parliament can only look back to section 1 and to the Act of 1894. The only liability which the shipowner can limit is a liability to damages.

H. L. (E.)
1955
THE STONEDALE No. 1.
Viscount Simonds.

I return, then, to section 32 of the Manchester Ship Canal Act, 1936, and at once ask the pertinent question whether the respondents in making their claim for the expenses incurred in raising the sunken vessel and, if necessary, proceeding in a court of competent jurisdiction for recovery of that sum as a debt seek to make the appellants liable to damages. It appears to me plain that they do not. Your Lordships were pressed by the argument that the Manchester Ship Canal Act should not be construed as taking away from shipowners a right conferred by a public Act. In my opinion no such question arises. The Merchant Shipping Acts relate to limitation of liability to damages; the Manchester Act confers a statutory right upon the company to raise a sunken vessel and to recover the expenses of raising her from the owner as a debt. The one does not derogate from the other and your Lordships are not called on to resolve any conflict between the provisions of a public Act and a local or private Act.

So far, my Lords, this seems to me a very plain case, but before I come to the alternative plea which is based on section 9 of the Manchester Ship Canal Act, 1897, I must notice an argument which has been urged on behalf of the appellants.

My Lords, it has been decided, and for the purposes of this case I will assume that it has been correctly decided, that, where, through negligence on the part of the owners, a vessel has sunk in such a position as to cause an obstruction in a navigable channel maintained by a conservancy authority, that authority has, in addition to any statutory rights it may have, a common law right to recover against the owners as damages the reasonable cost of removing the obstruction: see *Dee Conservancy Board* v. *McConnell.*[2] This decision was not called to the attention of Langton J. when he heard the case of *The Millie,*[3] and it has been suggested that, had that learned judge been aware of it, he might have come to a different conclusion. I do not see why he should. It may have to be decided some day whether a shipowner faced with such a common law claim can successfully limit his liability in respect of it under the Act of 1900. But it appears to me that this affords no argument for saying that a shipowner has a similar right in respect of a claim which is not a common law claim for damages for negligence but is a claim wholly independent of negligence and founded solely on statute. It may be said that it is anomalous that in the one case relief should be given to shipowners, in the other not. But the existence of an anomaly is

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[2] [1928] 2 K.B. 159.

[3] [1940] P. 1.

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no reason for giving to a section of an Act of Parliament a meaning which it cannot properly bear. There are indeed anomalies enough in this branch of the law; for instance, it may be regarded as an anomaly that under section 74 of the Harbours, Docks and Piers Clauses Act, 1847, the owner of a vessel is answerable for damage done by her to a dock though there has been no negligence whatever: see *Great Western Railway Co.* v. *Mostyn (Owners).*[4] It may perhaps be thought an anomaly that under the very Act we are here considering the statutory right arises under section 32 irrespective of any negligence on the part of the owner or his servants. It would be an even greater anomaly if, when the respondents had exercised their statutory right and claimed against the appellants, the latter could limit their liability if they had been negligent but could not do so if they had not been negligent. In considering this section and its implications my mind has been powerfully affected by that part of the judgment of Jenkins L.J. in which he deals with the provision by which the owner is given an option to do the necessary work at his own expense. I respectfully agree with him [5] in thinking that for the reasons that he gives limitation is excluded by necessary implication owing to the absurd results which would ensue, and I do not think he goes too far in saying that an alternative which might enable the owner to recover a valuable vessel at the expense of the company to the extent of the difference between the full and limited cost of raising it should be rejected as repugnant to justice and common sense. But, having said so much about anomalies, I think it right to repeat that I found my opinion that the appellants have no right of limitation upon the plain words of the statutes.

This matter has come before this House for argument for the first time in this appeal. But it is not, I think, of negligible importance that in *The Countess* [6] it was in every court assumed that no question of limitation arose in regard to the expenses of raising a sunken vessel by the Mersey Dock and Harbour Board. There may, as counsel suggested, have been good reasons for not raising the question. But it does not appear to have been raised at any time in the half century and more that has elapsed since the 1900 Act became law except in the case of *The Millie,*[7] in which it was rejected. Your Lordships will at least be satisfied that in rejecting the claim again you will not be departing from a long course of practice or running counter to an established doctrine, and may derive some support from the opinion of the late Scott L.J. which appears in one report of *Tyne Improvement Commissioners* v. *Armement Anversois Société Anonyme* (*The Brabo*).[8] The passage does not occur in the official report of the case (sub nom. *The Brabo* [9]), no doubt because it was only a dictum which was appended by the learned Lord Justice to a judgment which was on the face of it the judgment of the court.

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[4] [1928] A.C. 57; 44 T.L.R. 179.

[5] [1954] P. 338, 367; [1954] 2 All E.R. 170.

[6] [1921] P. 279; 37 T.L.R. 594; (C.A.) [1922] P. 41; 38 T.L.R. 218 (H.L.); sub nom. *Mersey Docks and Harbour Board* v. *Hay* [1923] A.C. 345; 39 T.L.R. 302.

[7] [1940] P. 1.

It remains to consider the alternative plea founded on section 9 of the Manchester Ship Canal Act, 1897, which is as follows: "The owners of any vessel or of any share in such vessel which "without actual fault or privity of the owners shall cause any "injury or damage to the portion of the canal extending from "the entrance at Eastham (including that entrance) up to the "westerly end of the pier at the Mode Wheel Locks or to the "banks locks or works comprised in such portion shall not be "liable in respect of such injury or damage to an amount exceed-"ing £8 for every registered ton of such vessel."

My Lords, in *Workington Harbour and Dock Board* v. *Towerfield (Owners)* [10] the House had to consider section 74 of the Harbours, Docks and Piers Clauses Act, 1847, the relevant words for this purpose being "damage done by such vessel . . . to the "harbour, dock, or pier," and concluded that the damage was confined to that physically done to the harbour by the stranding of the vessel. Thus Lord Normand [11] confined it to "physical "damage to the opera manufacta of the undertaking," and in these words my noble and learned friend Lord Morton of Henryton concurred,[12] while Lord Radcliffe said [13]: "I only wish to "make it plain that in my view the section is confined to damage, "not damages. I think it covers no more than the actual "physical damage which a vessel may do to the works which "constitute the harbour, dock or pier." I do not think that these words were, as suggested by counsel, obiter. I think they constitute a decision of this House on the scope of section 74 of the Act of 1847. It is true that that section differs from section 9 of the Manchester Ship Canal Act, 1897, in that in the latter

[8] [1947] 2 All E.R. 363, 370.

[9] [1948] P. 33; 63 T.L.R. 494.

[10] [1951] A.C. 112; 66 T.L.R. (Pt. 2) 387; [1950] 2 All E.R. 414.

[11] [1951] A.C. 112, 148.

[12] Ibid. 155.

[13] Ibid. 161.

section but not in the former the word "damage" is preceded by the words "injury or." But I do not think that these words make any real difference. Nor, apart from the authority of the *Workington Harbour* case,[14] should I have any doubt about the scope and effect of the section that we have to consider. The whole context points to physical damage to physical things: I do not understand what otherwise is meant by injury or damage to a portion of a canal. It is clearly something widely different from a loss suffered by undertakers in respect of their undertaking in consequence of such damage.

In an argument, which was not the less cogent for being short, Mr. Bucknill called attention to *The Chr. Knudsen.*[15] In that case the plaintiffs as owners of a dock brought an action in rem against the owners of a foreign vessel to recover the expenses incurred in relation to a barge which was sunk in their harbour, as they alleged, by the negligence of the defendants. The defendants moved to set aside the service of the writ on the ground that the claim was not for "damage done by a ship" within the meaning of section 22 (1) (*a*) (iv) of the Supreme Court of Judicature Act, 1925. Bateson J. had no difficulty in determining that the claim of the plaintiffs was for damage done by a ship. I do not think that this decision is of any assistance to the appellants. It is customary to personify the ship and to say that a ship does the damage, as in fact physically it does. But that would not, I think, justify your Lordships in saying that "injury or damage to a portion of a canal" are apt words to cover the loss incurred by undertakers in respect of their undertaking.

In my opinion the appellants' pleas alike under section 9 of the Manchester Ship Canal Act, 1897, and section 1 of the Merchant Shipping Act, 1900, fail and this appeal should be dismissed with costs.

LORD MORTON OF HENRYTON. My Lords, I agree with the speech which has just been delivered by my noble and learned friend on the Woolsack.

LORD TUCKER. My Lords, in so far as the appellants' claim is based upon sections 1 and 3 of the Merchant Shipping Act, 1900, it is governed by the decision of Langton J. in *The Millie.*[16] For the reasons which have been stated by my noble and learned friend on the Woolsack I agree that this decision should be upheld, though I am not sure that Langton J. arrived at his decision for quite the same reasons. I do not desire to add any observations on this part of the case.

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[14] [1951] A.C. 112.

[15] [1932] P. 153; 48 T.L.R. 619.

[16] [1940] P. 1.

With regard to the alternative claim under section 9 of the Manchester Ship Canal Act, 1897, I think that it fails for substantially the same reason as the claim under the Merchant Shipping Act. The liability envisaged under this section seems to me to be a liability incurred at common law or by statute in respect of injury or damage to the specified portion of the canal or to the banks, locks or works comprised therein. It is the injury or damage which gives rise to the liability. Under section 32 of the Manchester Ship Canal Act, 1936, however, the right to recover as a debt the expenses of raising a sunken vessel is given irrespective of any liability based upon injury or damage. It is a different cause of action altogether. Assuming, therefore, that a sunken barge lying on the bed of the canal thereby causes physical injury or damage to the canal, and that an action in respect of such injury or damage might be subject to section 9, none the less the right to recover the expenses of raising the barge conferred by section 32 of the 1936 Act remains unimpaired.

I would prefer to base my rejection of the appellants' claim under section 9 on the above ground rather than on the ground that no physical injury or damage to the canal can result from the presence of the sunken barge. I do not for a moment question the correctness of the view that the injury or damage referred to in the section means physical injury or damage and does not cover consequential loss suffered by the undertakers in respect of their undertaking as distinct from the cost of remedying the actual physical injury or damage.

I do not think there is anything in the decision of this House in *Workington Harbour and Dock Board* v. *Towerfield* (*Owners*) [17] which binds me to hold that the presence of this sunken barge lying on the bed of the canal cannot constitute injury or damage to the canal. I would therefore have preferred to keep this question open.

For these reasons I would dismiss the appeal.

LORD KEITH OF AVONHOLM. My Lords, I concur. I do not find it necessary to arrive at any conclusion on whether obstruction caused by the sinking of a vessel may be physical injury or damage to the canal under section 9 of the Manchester Ship Canal Act, 1897.

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[17] [1951] A.C. 112.

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LORD SOMERVELL OF HARROW. My Lords, I agree. On the claim under section 9 of the Manchester Ship Canal Act, 1897, I am content to base my conclusion on the ground stated by my noble and learned friend, Lord Tucker, leaving open the question whether there was any "injury or damage" to the canal.

Appeal dismissed.

Solicitors: *Thomas Cooper & Co.; Hill, Dickinson & Co.*

[HOUSE OF LORDS.]

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June 20, 21, 22; *July* 25.

EDWARDS (INSPECTOR OF TAXES) . . APPELLANT;

AND

BAIRSTOW AND ANOTHER . . . . . RESPONDENTS.

Revenue—Income tax—Profits of trade—Isolated transaction—Adventure in the nature of trade—Purchase and sale of spinning plant—Finding of General Commissioners—Review—Principles—Income Tax Act, 1918 (8 *&* 9 *Geo.* 5, *c.* 40), *Sch. D, Case I.*
Fact or law.

In 1946 the respondents, neither of whom had previously had any transactions in machinery, embarked on a joint venture to purchase for £12,000 a complete spinning plant, agreeing between themselves not to hold it but to make a quick resale. Potential purchasers were approached and there were divers negotiations, but it was not until February, 1948, that the whole plant had been sold in several lots at a profit of £18,225 11s. 3d. There had been no advertising, but expenses had been incurred for commissions for help in effecting the sales, for insurance, renovation of the plant, office work in connexion with the transaction, travelling and entertaining and rent for the housing of the plant. The General Commissioners found that there was not an adventure in the nature of trade to justify an assessment to income tax under Case I of Schedule D to the Income Tax Act, 1918:—

Held, that the facts found led inevitably to the conclusion that the transaction was an adventure in the nature of trade and that the commissioners' inference to the contrary should be set aside.

Per Viscount Simonds: The finding that the transaction was not an adventure in the nature of trade is an inference of fact but can be set aside because it appears that the commissioners have acted without any evidence or on a view of the facts which could not reasonably be entertained. In making that inference they are to be assumed to have been rightly directed in law as to the characteristics which distinguish such an adventure, and, so far as the Scottish courts have diverged from this approach to such problems, the other approach, adopted by the English courts, is to be preferred.

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* *Present*: VISCOUNT SIMONDS, LORD RADCLIFFE, LORD TUCKER and LORD SOMERVELL OF HARROW.

Per Lord Radcliffe: Without any misconception of law appearing on the face of the case stated, the facts found may be such that no person acting judicially and properly instructed as to the relevant law could have come to the determination reached; the court may then intervene, having no option but to assume that some misconception of law is responsible for the decision. There is no divergence between the approach of the English and Scottish courts on the principle that such a determination can only be upset if it is erroneous in point of law, but there may have been some divergence in the application of that principle.

Cooper v. *Stubbs* [1925] 2 K.B. 753; 41 T.L.R. 614; *Jones* v. *Leeming* [1930] A.C. 415; 46 T.L.R. 296 and *Inland Revenue Commissioners* v. *Fraser*, 1942 S.C. 493; 24 T.C. 498 considered.

Decision of the Court of Appeal (1954) 33 A.T.C. 131 reversed.

APPEAL from the Court of Appeal (Evershed M.R., Jenkins and Hodson L.JJ.).

This was an appeal from an order of the Court of Appeal dated May 10, 1954, dismissing an appeal by the appellant, Harold Lewis Edwards (Inspector of Taxes), from an order of the High Court (Wynn-Parry J.) dated February 17, 1954, whereby an appeal from a determination of the Commissioners for the General Purposes of the Income Tax for the Division of West Morley in the County of York on a case stated by them was dismissed and their determination was affirmed. The question in the appeal arose on two assessments to income tax made on the respondents, Harold Bairstow and Fred Harrison, in respect of certain operations carried on by them as a joint venture in partnership in the years 1946–47 and 1947–48 whereby certain spinning plant was acquired by them and disposed of at a profit. The assessments for the years ending respectively April 5, 1947, and April 5, 1948, had originally been made on Bairstow only, but it became common ground that the operations out of which the profits arose were the joint venture of both respondents and the case was argued throughout on the footing of the assessments being made in their joint names. They were in the sum of £10,326 for the first year and £5,000 for the second year. The commissioners discharged the assessments and, the appellant having declared dissatisfaction, a case was stated.

Paragraph 3 of the case stated was as follows: " The following " facts were admitted or proved:—(1) Mr. Harrison became " aware in 1946 that a complete spinning plant was for sale at " Messrs. Whitworths at Luddenden Foot and had reason to " believe that the plant could be purchased for a reasonable " figure. He communicated this information to Mr. Bairstow " as he himself was not in a position to finance any purchase. " Mr. Bairstow expressed himself to be interested but both he " and Harrison agreed that they had no intention of holding the " plant—what they desired was a quick purchase and re-sale. " Mr. Bairstow therefore arranged for a valuation to be made by " a professional valuer in order that he might be satisfied that the " price asked by Whitworths was one on which he could make a " quick profit. He also immediately and before purchasing the " plant made inquiries as to whether he could arrange to sell the " plant even before it had been purchased. Mr. Harrison was " in touch with an Indian by name Wattal who was very anxious " to purchase some of the plant, namely, the botany spinning " section; for this he was prepared to pay £17,000 but both " Harrison and Bairstow were quite decided that they had no " intention of selling the plant piece-meal; they wanted to sell it " as a complete unit. Then Mr. Bairstow began negotiations " with the International Export Co. They said they were pre- " pared to buy the whole of the plant. On November 14 the " International Export Co. wrote to Mr. Bairstow saying that " they were prepared to buy the plant which was on the fourth " floor which was the botany spinning plant for £15,000 this, of " course, being £2,000 less than the price offered for the same " section of the plant by the Indian Wattal. The reason why " the International Export Co. were prepared to pay £15,000 " immediately for that particular section of the plant was because " although they were willing to purchase the whole of the plant " it was their intention to export it and whilst they were con- " fident that an import licence into China would be forthcoming " for the asking in respect of the botany spinning section they " were not willing to complete the purchase of the remainder of " the plant until the import licences for such remainder were in " fact forthcoming. On November 20 Mr. Bairstow on behalf " of himself and Harrison having negotiated the purchase of the " spinning plant together with two small items of warping plant " completed the purchase by the payment to Whitworths of " £12,000. On November 27, one week later, the International " Export Co. paid Mr. Bairstow the sum of £15,000 for the

" botany spinning plant. Subsequently Messrs. Bairstow and " Harrison were informed by the International Export Co. that " unfortunately the import licences relating to the remainder of " the plant could not be obtained and therefore it was regretted " that they could not purchase the remainder of the plant. Thus " Mr. Bairstow and Mr. Harrison found themselves with the " remainder of the plant on their hands (which they had " endeavoured to avoid) and this left them no alternative but to " sell that remainder in whatever market they could. (2) The " rest of the plant was sold in two other principal and two " smaller lots by February, 1948, though owing to difficulties the " last plant was not removed until March, 1949. The two " smaller lots consisted of the two items of warping plant. " (3) Mr. Bairstow was a director of a company manufacturing " leather. Mr. Harrison was an employee of a spinning firm. " Neither of them had had any transactions in machinery or " any other commodity before. (4) The profits shown by the " accounts (which form part of this case and are annexed hereto, " marked 'A') was £18,225 11s. 3d. (5) The respondents' sole " purpose in the transaction was to sell the plant at a profit. " (6) With regard to the manner in which the sales were " effected:—(A) Some commissions were paid for assistance " received in effecting sales. (B) There was no advertising. " Customers principally learnt of the existence of the plant for " sale when they came to inspect the premises which were being " advertised by the original owners as becoming vacant. (C) " About 400 spindles out of the 220,000 which the plant repre" sented were replaced because they were missing or damaged. " (D) Insurance risks were covered by the respondents while the " plant was in their hands. (E) Some costs for renovation were " incurred because of damage by floods during their ownership. " (F) When it was seen that the transaction would not be over " in a matter of weeks, wages were paid to Mr. Bairstow's " secretary who kept books and did other office jobs in con" nexion with these transactions. (G) The respondents incurred " expense in travelling and entertainment in meeting both the " actual persons who would eventually buy the plant and others " who did not in fact become customers. A number of adver" tisements asking for plant, which appeared in trade papers, " were answered by the respondents in an attempt to sell the " plant remaining after the first main sale. (H) Owing to the " delay in removing the plant, rent was paid to the landlords for " the last six months during which the plant was housed, and

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"it is thought that a further amount will have to be paid to "put the premises in order."

EXHIBIT "A" Case Stated

MR. HAROLD BAIRSTOW AND MR. FRED HARRISON

JOINT VENTURE—A SPINNING PLANT EX WHITWORTH MILL, LUDDENDEN FOOT

PERIOD FROM NOVEMBER 20, 1946, TO MARCH 31, 1949

	£	s.	d.	£	s.	d.
To Purchase of Plant				12,000	0	0
,, Repairs and Replacements...				110	18	10
,, Commissions:						
Cornelius Lane of Bradford	4,575	4	4			
Mr. and Mrs. Horace Shaw, Highthorn, Belmont Rise, Baildon ...	751	2	0			
W. Murgatroyd — address not known, but our clients believe he has gone abroad	250	0	0			
Cash Commission to a workman	10	0	0			
				5,584*	6	4
,, Insurance				71	15	6
,, Christmas Boxes				32	0	0
,, Flood Damage Costs:—						
Wages	300	5	11			
Renovations	42	16	9			
				343	2	8
,, Wages				117	5	0
,, Stationery				3	0	0
,, Travelling and Entertainment				366	13	11
,, Rent				130	0	0
,, Reserve for cost of dilapidations, legal and accountancy charges				785	0	0
,, Profit on the transaction ...				18,225	11	3
				£37,769	13	6

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* Sic.

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Profit divisible:—			
Harold Bairstow ...	£9,112	15	7
Fred Harrison ...	£9,112	15	7

	£	s.	d.	£	s.	d.
By Sale of Plant:—						
1946—Nov. 27 International Export Co. ...	15,439	13	6			

	£	s.	d.	£	s.	d.
Brought forward	15,439	13	6			
1947—Jan. 29 H. E. Crabtree & Co. ...	80	0	0			
June 26 Bailey, Verity and Raynor ...	12,000	0	0			
Oct. 22 Stalybridge Vigoyne Spinning Co.	250	0	0			
1948—Feb. 20 Joseph Cooper Jnr.	10,000	0	0			
				37,769	13	6
				£37,769	13	6

The respondents contended that this was a transaction the profits of which could not be liable to tax under Case I of Schedule D,[1] because, as they said, in the case of *Jones* v. *Leeming*,[2] "four conditions had been approved by the court, "one of which must be present to establish liability; (A) the "existence of an organization, or (B) activities which led to the "maturing of the asset to be sold, or (C) the existence of special "skill, opportunities, in connexion with the article dealt with, "or (D) the fact that the nature of the asset itself should lend "itself to commercial transactions." And they contended that none of these conditions was present in the transaction in question.

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[1] By Sch. D to the Income Tax Act, 1918: "1. Tax under this Schedule "shall be charged in respect of—(*a*) "The annual profits or gains arising "or accruing . . . (ii) to any person "residing in the United Kingdom "from any trade, profession, employ- "ment or vocation . . . 2. Tax under "this Schedule shall be charged under "the following Cases respectively; "that is to say—Case I—Tax in "respect of any trade not contained "in any other Schedule . . ."

By s. 237: ". . . 'Trade' includes "every trade, manufacture, adventure "or concern in the nature of trade ". . ."

[2] [1930] A.C. 415; 46 T.L.R. 296.

They distinguished certain cases upon which the appellant relied and urged that the profit was a capital one and that there was no concern in the nature of trade that could be taxed.

On behalf of the appellant it was contended " that the buying " and selling of the plant constituted a trade or adventure in " the nature of a trade and that the profits and gains arising " therefrom were assessable " accordingly.

The commissioners expressed their original determination in these terms: " We, the commissioners, having considered the " facts and evidence submitted to us, are of opinion that this " was an isolated case and not taxable and discharge the " assessments."

When the matter came before Upjohn J. on the case stated, he remitted it to the commissioners with the intimation that they were to consider and answer the question whether the transaction, being an isolated transaction, was nevertheless " an adventure in " the nature of trade " which was assessable to tax under Case I of Schedule D, and he further directed that they should be assisted in their finding by legal argument.

The commissioners accordingly met again and, having heard legal argument and further considered the matter, signed a supplemental case in which they stated their further decision as follows:—" We find that the transaction, the subject-matter of " this case, was not an adventure in the nature of trade."

The case thus supplemented came once more before the High Court, this time before Wynn-Parry J., who took the view that he was bound by authority to hold that the question before the court was purely one of fact and that the finding of the commissioners could not be upset unless it was so perverse that as a matter of law it could not stand, and, holding that it was not possible for him to take that view of their decision, dismissed the appellant's appeal with costs.

From the decision of Wynn-Parry J. the appellant appealed to the Court of Appeal, which unanimously dismissed the appeal for the reasons given by Wynn-Parry J. In the course of his judgment the Master of the Rolls made this observation, which gave rise to much discussion before the House of Lords[3]: " Although the Scottish courts (as, I think, is clear from a citation from the judgment of the latest of them in the judgment " of Upjohn J.) may have taken a road which diverges from that " followed by the English courts, the two jurisdictions, as it

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[3] (1954) 33 A.T.C. 131, 133.

"seems to me, can only now be got together again by the House "of Lords. . . ."

Cyril King Q.C. and *Sir Reginald Hills* (*Sir Reginald Manningham-Buller Q.C., A.-G.* with them) for the appellant. The relevant provisions of the Income Tax Act, 1918, are Schedule D, paragraphs 1 (*a*) (ii) and 2, Case I, the rule applicable to Case I, rule 10 of the rules applicable to Cases I and II (dealing with a trade carried on by two or more persons jointly) and section 237 defining "trade." See section 149 as to cases stated. See also Income Tax Act, 1842, s. 100, Sch. D, Cases I and II, r. 3.

A joint adventure may be carried on by two or more persons on joint account as well as in partnership. This was a joint adventure.

One should approach the finding of the commissioners by distinguishing between the primary facts found and the conclusions drawn from those facts. In cases under the Income Tax Act all the facts are before the court, which is entitled to form its own opinion. Looking at the conclusion reached by the commissioners on the stated facts, the court may find that their conclusion is such that no reasonable person could have reached it. Then the conclusion can be reversed. But if on a consideration of the facts stated a reasonable man can choose one of two conclusions, that is a middle field in which the commissioners are masters: see *Bracegirdle* v. *Oxley.*[4]

This was not a profit which should escape tax on the ground that it was an isolated case: see *Californian Copper Syndicate Ld.* v. *Harris*[5]; *Tebrau* (*Johore*) *Rubber Syndicate Ld.* v. *Farmer*[6]; *Thew* v. *South West Africa Co. Ld.*[7]; *Martin* v. *Lowry*[8]; *Inland Revenue Commissioners* v. *Livingston*[9]; *Pearn* v. *Miller*[10]; *Rutledge* v. *Inland Revenue Commissioners*[11]; *Cooper* v. *Stubbs.*[12] In the English cases matters of this sort have been treated as pure fact, whereas the question here is one of mixed law and fact and the approach to it should be rather that adopted by the Scottish courts. *Cooper* v. *Stubbs*[12] does not present the same problem as the case under appeal, which is not a pure question of fact. *Leeming* v. *Jones*,[13] affirmed in the House of Lords sub nom. *Jones* v. *Leeming*,[14] does not lay down any general principle. It was really a battle on Case VI and it distinguished *Cooper* v. *Stubbs*.[15] The Scottish courts have laid down the right principles in dealing with questions of mixed law and fact in cases stated: *Inland Revenue Commissioners* v. *Fraser*[16]; *Inland Revenue Commissioners* v. *Toll Property Co. Ld.*,[17] and *Inland Revenue Commissioners* v. *Reinhold*.[18]

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[4] [1947] K.B. 349, 353, 356, 356–7, 358; 63 T.L.R. 98; [1947] 1 All E.R. 126.

[5] (1904) 6 F. 894; 5 T.C. 159.

[6] 1910 S.C. 906; 5 T.C. 658.

[7] (1924) 131 L.T. 248; 9 T.C. 141.

[8] [1926] 1 K.B. 550, 559; 42 T.L.R. 233; [1927] A.C. 312; 43 T.L.R. 116.

[9] 1927 S.C. 251; 11 T.C. 538.

[10] (1927) 11 T.C. 610.

[11] 1929 S.C. 379; 14 T.C. 490.

[12] [1925] 2 K.B. 753; 41 T.L.R. 614.

In the present case the facts found show clearly a trading adventure entered into in the course of a scheme of profit making: see *Californian Copper Syndicate Ld.* v. *Harris*[19]; *Thew* v. *South West Africa Co. Ld.*,[20] and *Inland Revenue Commissioners* v. *Livingston*.[21] The machinery was acquired by the two men on joint account in their capacity as traders in this adventure. The mere fact that there were two men is not unimportant, since they joined together for an express purpose. The quality of their operations in holding the machinery after purchase and doing repairs brings the matter within the class of cases represented by *Martin* v. *Lowry*[22] and *Rutledge* v. *Inland Revenue Commissioners*.[23]

If the matter in such a case as this be held to be one entirely of fact the principle must include both the General and the Special Commissioners. That would be an unsatisfactory position. If the matter is not one of pure fact the court is the judge of the fact and the law and can give the cases a sense of direction. In *Inland Revenue Commissioners* v. *Fraser*[24] the court looked at the meaning of the word "trade," on which so much depends in the present case, and held that there was in the case stated an error which it corrected. *Jones* v. *Leeming*[25] does not prevent that course being adopted. That was a different case in which the House of Lords was not laying down a ruling principle. On the Scottish view of the matter a question of law must arise on the meaning of "adventure . . . in the nature of trade" in the Act. The commissioners have either wrongly construed the words of the Act on this point or they have taken a view of the facts which no reasonable man could take: see *Bracegirdle* v. *Oxley*.[26] This view was accepted by Warrington and Atkin L.JJ. in *Cooper*

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[13] [1930] 1 K.B. 279.
[14] [1930] A.C. 415; 46 T.L.R. 296.
[15] [1925] 2 K.B. 753.
[16] 1942 S.C. 493; 21 T.C. 498.
[17] 1952 S.C. 387; 34 T.C. 13.
[18] 1953 S.C. 49; 34 T.C. 389.
[19] 6 F. 894; 5 T.C. 159.
[20] 131 L.T. 248; 9 T.C. 141.
[21] 1927 S.C. 251; 11 T.C. 538.
[22] [1926] 1 K.B. 550.
[23] 1929 S.C. 379; 14 T.C. 490.
[24] 1942 S.C. 493; 21 T.C. 498.
[25] [1930] A.C. 415.
[26] [1947] K.B. 439.

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v. *Stubbs.*[27] In *Inland Revenue Commissioners* v. *Fraser*[28] the effect of *Jones* v. *Leeming*[29] was correctly dealt with. Section 149 (1) (*d*) of the Income Tax Act, 1918, directs that in the case stated the facts and determination shall be set forth, and it is thus intended that the court shall be able to look at both the facts and the law in reaching a determination under section 149 (2) (*a*). The crux of the matter is the respondents' contention that it is not the function of the court to review the finding of the commissioners on a question of fact unless it is entitled to take the view that they have misunderstood the law or that their finding was perverse.

In summary, the respondents are chargeable to income tax under Case I of Schedule D in respect of the profits arising to them from the joint venture of acquiring and selling the plant. That venture was a "trade" within Case I as defined in section 237 and was an "adventure" within the meaning of that word in the definition. The joint venture, the operations of which extended over 17 months and consisted of numerous particular business activities, was an adventure within the charge of income tax in Case I. In deciding, after hearing legal argument, that the joint venture was not an "adventure" within the charge, the commissioners erred in law and misconstrued the meaning of the word in its statutory context. Alternatively, in so deciding they acted without any evidence or on a view of the facts which could not be reasonably entertained. On the admitted facts, no other view is possible than that the respondents, in carrying on their joint venture, carried on an "adventure" within Case I and were therefore chargeable to income tax in respect of the profits arising therefrom.

Sir Reginald Hills following. The only way in which an assessment can be challenged is by case stated. The case stated must set out the facts: see sections 137 and 149 of the Income Tax Act, 1918. *Jones* v. *Leeming*[30] on its special facts cannot be treated as an authority governing other cases with different special facts. Lord Thankerton[31] cites *Inland Revenue Commissioners* v. *Livingston*[32] and treats it as a valid decision. The word "adventure" cannot be ignored. It has a legal meaning and there is strong ground for thinking that the legislature was familiar with it in its legal context in connexion with trading activities in a commercial and profit-making atmosphere: see

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[27] [1925] 2 K.B. 753.
[28] 1942 S.C. 493; 24 T.C. 498.
[29] [1930] A.C. 415.
[30] [1930] A.C. 415.
[31] Ibid. 428.
[32] 1927 S.C. 251; 11 T.C. 538.

Californian Copper Syndicate Ld. v. *Harris.*[33] According to the Oxford English Dictionary one meaning of "adventure" is "a "pecuniary risk, a venture, a speculation, a commercial enter-"prise," and an "adventurer" is "one who undertakes, or "shares in, commercial adventures or enterprises; a speculator." Under section 32 (*b*) of the Partnership Act, 1890, a partnership may be entered on "for a single adventure or undertaking." In the Income Tax Act, 1918, "adventure" may mean a short-term profit-making operation. A boat for a particular purpose might be specially built and sold at a large profit. That would be an adventure, even though it was an isolated transaction. In several cases it is very relevant to look at the commodity dealt with, as the question arises in what capacity it is that a man buys a particular thing. *Martin* v. *Lowry*[34] was a clear case, and if the commissioners had held the other way the court would have held that they had come to an impossible conclusion. *Cooper* v. *Stubbs*[35] was far away from this case. The word "adventure" never came into it. It was a case of the continuous carrying on of a trade. The present is a case of buying and selling. In cases of industrial accidents the question whether due care has been taken may be considered by the court as one of degree, but the mere fact that it is a question of degree does not prevent the court from saying that the requisite degree has not been reached. The courts in income tax cases require the commissioners to set out the facts and they may say that those facts do not give rise to the commissioners' conclusions. Here the legislature meant something by using the word "adventure," which is different from a "concern." If the facts here set out do not disclose an "adventure," it is hard to say what can be one.

Senter Q.C. and *Roderick Watson* for the respondents. The Crown's proposition is not clear as to the difference alleged to exist between the practice in Scotland and in England. It was not asserted that the court was entitled to retry the case. The very strong judgments of Warrington and Atkin L.JJ. in *Cooper* v. *Stubbs*[36] were against that view. The respondents adopt the suggestion of Evershed M.R. in the present case[37] with regard to *Inland Revenue Commissioners* v. *Fraser*,[38] which, properly understood, is not really inconsistent with the reasoning in the English decisions. The finding of the commissioners in that case was not a clean finding of fact. The same is true of *Inland*

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[33] 6 F. 894; 5 T.C. 159.

[34] [1926] 1 K.B. 550.

[35] [1925] 2 K.B. 753.

[36] Ibid.

[37] 33 A.T.C. 131, 133.

[38] 1942 S.C. 493; 21 T.C. 498.

Revenue Commissioners v. *Livingston* [39] and *Inland Revenue Commissioners* v. *Toll Property Co. Ld.*[40] In *Inland Revenue Commissioners* v. *Reinhold* [41] the finding of the commissioners was upheld as a finding of fact.

In the present case the views expressed by Evershed M.R. and Wynn-Parry J. show that it is impossible to say here that there has been perversity in the commissioners' finding in the sense of there being no evidence at all to support it. It is impossible to say that they misdirected themselves as to the meaning of the word " adventure " in the Act or on any other legal matter. The criteria adopted in the present case accord with those applied in *Inland Revenue Commissioners* v. *Fraser*.[42] Apart from *Jones* v. *Leeming* [43] it would be hard to find a case in which the attention of the commissioners had been so clearly directed to the proper matters for consideration. This appears on the face of the case stated. This is not a case of a commodity stamped with a trading character.

Counsel for the Crown are wrong in their construction of " adventure " in the Act. It is not to be distinguished from " concern." In section 237 " adventure or concern " amount to the same thing for the present purpose. The proper question is whether or not this was an adventure " in the nature of trade," and this is for the commissioners to decide as a question of fact.

The evidence set out in the case stated shows that this was not a trading adventure. The organization was on too trifling a scale. It was confined to Bairstow's secretary. The only work done on the plant was trifling. Nothing was done to mature the asset. There was no advertising. Neither of the respondents had any special skill which placed him in an advantageous position in carrying through the transactions. The purchase and sale of the plant lent itself to capital rather than commercial transactions. The commissioners weighed up all these matters and applied the proper tests and they were justified in arriving at their finding of fact. To upset them one would have to show that they misdirected themselves, misunderstanding the law, or else that there was no evidence at all to support their finding so that it was perverse. To allow this appeal would open the floodgates to innumerable appeals from the General Commissioners all over the country.

The basic submission for the respondents is that before such sums as this are taxable there must be a source of income. In *Jones* v. *Leeming*[44] (*Leeming* v. *Jones*[45] below) it was argued for the Crown that the transaction itself was the source of income. But that will not do here, where the Crown is alleging that the source of income is a "trade" chargeable under Case I of Schedule D.

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[39] 1927 S.C. 251; 11 T.C. 538.

[40] 1952 S.C. 387; 34 T.C. 13.

[41] 1953 S.C. 49; 34 T.C. 389.

[42] 1942 S.C. 493; 24 T.C. 498.

[43] [1930] A.C. 415.

The question, then, is whether there is here a "trade" in an extended meaning giving rise to taxable income. There is not such a trade, and if the Crown is not satisfied with the position its remedy lies in legislation. Although the case was argued for the Crown on a narrow front as though an adventure in the nature of trade was something special, it is really only one aspect of trade in the charging section. The question may arise whether a person carries on a trade or more than one trade or has ceased to carry on a trade, or whether something is a trading sale. A company may be in a different position from an individual in this field. In *Inland Revenue Commissioners* v. *Toll Property Co. Ld.*[46] importance was attached to the function of the company. In *Balgownie Trust Ld.* v. *Inland Revenue Commissioners*[47] it was said that the company was doing what it was formed to do. See also *Inland Revenue Commissioners* v. *Hyndland Investment Co. Ld.*[48] As to the distinction between sources of income in different cases, see *Bennett* v. *Marshall.*[49] In the case of an individual trading the activity is the source of income. He will have performed a number of acts and it is for the commissioners to say what those acts add up to.

The Crown's basic proposition is that this was a profit-making scheme and as such gave rise to taxable profits, but the scheme must be considered fairly in its context. *Californian Copper Syndicate Ld.* v. *Harris*[50] was a case of a company with a profit-making object. That is a special fact and what is true of a company may not be true of an individual. This was admittedly not a case of partnership. In the case of a company there is continuity and a profit-making motive, but in the case of an individual the intention to make a profit is not the relevant test: *Jones* v. *Leeming*[51] and *Graham* v. *Green.*[52] A mere association between individuals does not take the case much further; the commissioners must take account of all other factors.

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[44] [1930] A.C. 415.

[45] [1930] 1 K.B. 279, 288.

[46] 1952 S.C. 387; 34 T.C. 13.

[47] 1929 S.C. 790, 794–5, 796; 14 T.C. 684.

[48] (1929) 14 T.C. 694, 699.

[49] [1938] 1 K.B. 591; 54 T.L.R. 320; [1938] 1 All E.R. 93.

[50] 6 F. 894; 5 T.C. 159.

[51] [1930] A.C. 415.

[52] [1925] 2 K.B. 37; 41 T.L.R. 371.

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On the question of the jurisdiction of the court in dealing with questions of fact in cases stated, *Cooper* v. *Stubbs* [53] and *Leeming* v. *Jones* [54] (*Jones* v. *Leeming* [55] in the House of Lords) are the sheet anchor of the respondents. *Calvert* v. *Wainwright* [56] is an example of the court saying that there had been a clear misunderstanding of the law. It is not wholly satisfactory to confine the authority of *Jones* v. *Leeming* [57] to the narrow question of what is an adventure or concern in the nature of trade. The broad question is concerned with the painfully familiar distinction between fact and law. See also *Levene* v. *Inland Revenue Commissioners* [58]; *Inland Revenue Commissioners* v. *Lysaght* [59]; *Rees Roturbo Development Syndicate Ld.* v. *Inland Revenue Commissioners* [60]; *Ducker* v. *Rees Roturbo Development Syndicate Ld.*[61]; *Currie* v. *Inland Revenue Commissioners* [62]; *Inland Revenue Commissioners* v. *Dean Property Co.*,[63] and *Inland Revenue Commissioners* v. *Scottish Automobile and General Insurance Co. Ld.*[64]

King Q.C. in reply. In a case such as this, where facts and inferences play such a great part, one cannot confidently turn to other cases for guidance unless they lay down some principle. An adventure is part of a trade only in the sense that both connote trading activities. One has to find that the adventure itself is the source of the profit which it is sought to tax. It is plain on the authorities that the point can arise out of a single transaction: see *Martin* v. *Lowry* [65]; *Rutledge* v. *Inland Revenue Commissioners*,[66] and *Californian Copper Syndicate Ld.* v. *Harris*.[67]

The question is whether on the facts found, which are not in dispute, there is a trading activity and a taxable profit arising from the purchase and sale of the machinery. It is important that the object of acquiring the machinery was to get a quick profit. In pursuance of this object the transaction was carried through on joint account. One of the respondents had knowledge of the machinery and the other had the capital; they combined the two. If one buys machinery it is unlikely that one does so otherwise than for the purposes of trading. Having regard to the general background, the machinery was bought as the subject-matter of a commercial transaction. As to the question what comes within trade, see *Ducker* v. *Rees Roturbo Development Syndicate Ld.*[68]

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[53] [1925] 2 K.B. 753.

[54] [1930] 1 K.B. 279, 283–4, 301.

[55] [1930] A.C. 415, 421–2, 426.

[56] [1947] K.B. 526; 63 T.L.R. 199; [1947] 1 All E.R. 282.

[57] [1930] A.C. 415.

[58] [1928] A.C. 217; 44 T.L.R. 374.

[59] [1928] A.C. 234, 246, 247; 44 T.L.R. 374.

[60] [1928] 1 K.B. 507, 515–6; 43 T.L.R. 796.

[61] [1928] A.C. 132; 44 T.L.R. 307.

[62] [1921] 2 K.B. 332; 37 T.L.R. 371.

[63] 1939 S.C. 545; 22 T.C. 706.

[64] 1932 S.C. 87; 16 T.C. 381.

[65] [1926] 1 K.B. 550.

[66] 1929 S.C. 379; 14 T.C. 490

[67] 6 F. 894; 5 T.C. 159.

There is no relevant distinction between an adventure entered on by two men in joint account or by one individual and an adventure by a limited company when on the facts the object of the men or the individual is not different from that of the company.

When the commissioners set down the facts proved and come to their decision, they must look at the Act and consider the statutory words. If they took the right view of the word "adventure" as construed in *Californian Copper Syndicate Ld.* v. *Harris*,[69] the question arises whether on the evidence they have gone wrong. Either they formed an erroneous view of the Act or they reached a wrong conclusion on the evidence, which was all one way. This is just the sort of case which should be reviewed by the court. *Inland Revenue Commissioners* v. *Fraser*[70] affords a signpost for the right approach. In *Jones* v. *Leeming*[71] the House of Lords never intended to say that such a case as this was a pure question of fact. Further, the meaning of "adventure" was not analysed there as here and in *Fraser's* case.[72]

Their Lordships took time for consideration.

VISCOUNT SIMONDS, having stated the facts, continued: My Lords, it is clear that the revenue authorities were anxious to bring this case to your Lordships' House largely because it was apprehended that the courts of England and Scotland had to some degree diverged in their treatment of this subject. That there is some ground for this apprehension will be clear from a comparison of (for example) the observations of Atkin and Warrington L.JJ. in *Cooper* v. *Stubbs*,[1] with those of Lord Russell in *Inland Revenue Commissioners* v. *Reinhold*[2]: "In the Scottish "courts, however, it is clear that such a question" (i.e., whether a transaction is an "adventure in the nature of trade") "is "regarded as a question of law, or at least of mixed fact and "law." It is not to be doubted that, particularly in a matter of taxation, any possible conflict, even if it be only an apparent conflict, should be resolved, and that is the task which now falls to your Lordships.

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[68] [1928] A.C. 132, 140, 142.

[69] 6 F. 894; 5 T.C. 159.

[70] 1942 S.C. 493; 24 T.C. 498.

[71] [1938] A.C. 415.

[72] 1942 S.C. 493; 24 T.C. 498.

[1] [1925] 2 K.B. 753; 41 T.L.R. 614.

[2] 1953 S.C. 49, 56; 34 T.C. 389, 394.

Before, however, examining the authorities in any detail, I would make it clear that in my opinion, whatever test is adopted. that is, whether the finding that the transaction was not an adventure in the nature of trade is to be regarded as a pure finding of fact or as the determination of a question of law or of mixed law and fact, the same result is reached in this case. The determination cannot stand: this appeal must be allowed and the assessments must be confirmed. For it is universally conceded that, though it is a pure finding of fact, it may be set aside on grounds which have been stated in various ways but are, I think, fairly summarized by saying that the court should take that course if it appears that the commissioners have acted without any evidence or upon a view of the facts which could not reasonably be entertained. It is for this reason that I thought it right to set out the whole of the facts as they were found by the commissioners in this case. For, having set them out and having read and re-read them with every desire to support the determination if it can reasonably be supported, I find myself quite unable to do so. The primary facts, as they are sometimes called, do not, in my opinion, justify the inference or conclusion which the commissioners have drawn: not only do they not justify it but they lead irresistibly to the opposite inference or conclusion. It is therefore a case in which, whether it be said of the commissioners that their finding is perverse or that they have misdirected themselves in law by a misunderstanding of the statutory language or otherwise, their determination cannot stand. I venture to put the matter thus strongly because I do not find in the careful and, indeed, exhaustive statement of facts any item which points to the transaction not being an adventure in the nature of trade. Everything pointed the other way. When I asked learned counsel upon what, in his submission, the commissioners could have reasonably founded their decision, he could do no more than refer to the contentions which I have already mentioned. But these upon examination seemed to help him not at all. For, if it is a characteristic of an adventure in the nature of trade that there should be an "organization," I find that characteristic present here in the association of the two respondents and their subsequent operations. I find "activities which led to the maturing of the asset "to be sold" and the search for opportunities for its sale, and, conspicuously, I find that the nature of the asset lent itself to commercial transactions. And by that I mean, what I think Rowlatt J. meant in *Leeming* v. *Jones*,[3] that a complete spinning plant is an asset which, unlike stocks or shares, by itself produces no income and, unlike a picture, does not serve to adorn the drawing room of its owner. It is a commercial asset and nothing else.

Your Lordships have examined a large number of cases in some of which the commissioners have found an adventure or concern in the nature of trade and in others have not. And in each category will be found cases in which the court has upheld and others in which the court has reversed the commissioners' decision. I do not think it necessary to review them. It is inevitable that the boundary line should not be precisely drawn, but I think that there has been no case cited to us in which the question, however framed, whether the determination of the commissioners was maintainable, could be answered more clearly and decisively than in the present case.

I must turn now to the question of the apparent divergence between the English and Scottish Courts and venture to approach it by a brief consideration of the nature of a problem which has many aspects, e.g., the finding of a jury, the award of an arbitrator, or the determination of a tribunal which is by statute made the judge of fact. And the present case affords an exact illustration of the considerations which I would place before your Lordships.

When the commissioners, having found the so-called primary facts which are stated in paragraph 3 of their case, proceed to their finding in the supplemental case that "the transaction, "the subject-matter of this case, was not an adventure in the "nature of trade," this is a finding which is in truth no more than an inference from the facts previously found. It could aptly be preceded by the word "therefore." Is it, then, an inference of fact? My Lords, it appears to me that the authority is overwhelming for saying that it is. Such cases as *Cooper* v. *Stubbs*,[4] *Jones* v. *Leeming*[5] and *Inland Revenue Commissioners* v. *Lysaght*[6] (a case of residence) amongst many others are decisive. Yet it must be clear that to say that such an inference is one of fact postulates that the character of that which is inferred is a matter of fact. To say that a transaction is or is not an adventure in the nature of trade is to say that it has or has not the characteristics which distinguish such an adventure. But it is a question of law, not of fact, what are those characteristics, or, in other words, what the statutory language means. It follows that the inference can only be regarded as an inference of fact if it is assumed that the tribunal which makes it is rightly directed in law what the characteristics are and that, I think, is the assumption that is made. It is a question of law what is murder: a jury finding as a fact that murder has been committed has been directed on the law and acts under that direction. The commissioners making an inference of fact that a transaction is or is not an adventure in the nature of trade are assumed to be similarly directed, and their finding thus becomes an inference of fact.

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[3] [1930] 1 K.B. 279.

[4] [1925] 2 K.B. 753.

[5] [1930] A.C. 415.

[6] [1928] A.C. 234; 44 T.L.R. 374.

If this is, as I hope it is, a just analysis of the position, the somewhat different approach to the question in some, but by no means all, of the Scottish cases is easily explicable. For as the Lord President (Lord Normand) put it in *Inland Revenue Commissioners* v. *Fraser*[7]: ". . . the commissioners here have "either misunderstood the statutory language (which I think is "the probable explanation of their error) or, having understood "it, have made a perverse finding without evidence to support "it." He might equally well have said that the assumption that they were rightly directed in law was displaced by a finding which was upon that assumption inexplicable. The misdirection may appear upon the face of the determination. It did so here, I think, in the case as originally stated: for in effect that determination was that the transaction was not an adventure in the nature of trade because it was an isolated transaction, which was clearly wrong in law. But sometimes, as in the case as it now comes before the court, where all the admitted or found facts point one way and the inference is the other way, it can only be a matter of conjecture why that inference has been made. In such a case it is easy either to say that the commissioners have made a wrong inference of fact because they have misdirected themselves in law or to take a short cut and say that they have made a wrong inference of law, and I venture to doubt whether there is more than this in the divergence between the two jurisdictions which has so much agitated the revenue authorities.

But, my Lords, having said so much, I think it right to add that in my opinion, if and so far as there is any divergence between the English and Scottish approach, it is the former which is supported by the previous authority of this House to which reference has been made. It is true that the decision of the commissioners is only impeachable if it is erroneous in law, and it may appear paradoxical to say that it may be erroneous in law where no question of law appears on the face of the case stated. But it cannot be, and has not been, questioned, that an inference, though regarded as a mere inference of fact, yet can be challenged as a matter of law on the grounds that I have already mentioned, and this is I think the safest way to leave it. We were warned by learned counsel for the respondents that to allow this appeal would open the floodgates to appeals against the decisions of the General Commissioners up and down the country. That would cause me no alarm, if decisions such as that we have spent some time in reviewing were common up and down the country. But nothing, I think, will fall from your Lordships to suggest that there is not a large area in which the opinion of the commissioners is decisive. I would myself say nothing to detract from what was said by Lord Sterndale M.R. and Scrutton L.J. in *Currie* v. *Inland Revenue Commissioners* [8] upon the kindred question whether the taxpayer was carrying on a profession, for I do not think that any more precise guidance can be given in the infinitely complex and ever-changing conditions of commercial adventures.

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[7] 1942 S.C. 493, 501; 24 T.C. 498, 504.

In the result the appeal will be allowed, but effect will be given to the special arrangement as to costs which was a condition of leave to appeal being given.

LORD RADCLIFFE. My Lords, the Crown has sought to charge the respondents with income tax upon the profit arising from the purchase and sales of certain spinning plant acquired and sold during the period 1946–48. This profit, it is said, came from a " trade, manufacture, adventure or concern in the nature " of trade " and so is taxable under Case I of Schedule D of the Income Tax Act, 1918.

The Commissioners for the General Purposes of the Income Tax for the Division of West Morley in the County of York, to whom the respondents appealed against the assessments, determined that the " transaction " which was their subject-matter was not an adventure in the nature of trade and discharged the assessments. In the High Court the Crown's appeal was dismissed by the learned judge (Wynn-Parry J.) on the ground that the determination was "purely a question of fact" and that accordingly it was not open to the court to interfere with it. The matter was treated in exactly the same way in the Court of Appeal.

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[8] [1921] 2 K.B. 332; 37 T.L.R. 371.

I should not myself have thought that the principles which govern a case of this sort offered much scope for controversy at this date, whether they are sought for in English or in Scottish legal decisions. The only difficulty that I see arises from the fact that in some cases judges have not been at pains to distinguish in their judgments what are the conditions which make the particular question before them no more than a question of fact.

My Lords, I think that it is a question of law what meaning is to be given to the words of the Income Tax Act "trade, "manufacture, adventure or concern in the nature of trade" and for that matter what constitute "profits or gains" arising from it. Here we have a statutory phrase involving a charge of tax, and it is for the courts to interpret its meaning, having regard to the context in which it occurs and to the principles which they bring to bear upon the meaning of income. But, that being said, the law does not supply a precise definition of the word "trade": much less does it prescribe a detailed or exhaustive set of rules for application to any particular set of circumstances. In effect it lays down the limits within which it would be permissible to say that a "trade" as interpreted by section 237 of the Act does or does not exist.

But the field so marked out is a wide one and there are many combinations of circumstances in which it could not be said to be wrong to arrive at a conclusion one way or the other. If the facts of any particular case are fairly capable of being so described, it seems to me that it necessarily follows that the determination of the Commissioners, Special or General, to the effect that a trade does or does not exist is not "erroneous in "point of law"; and, if a determination cannot be shown to be erroneous in point of law, the statute does not admit of its being upset by the court on appeal. I except the occasions when the commissioners, although dealing with a set of facts which would warrant a decision either way, show by some reason they give or statement they make in the body of the case that they have misunderstood the law in some relevant particular.

All these cases in which the facts warrant a determination either way can be described as questions of degree and therefore as questions of fact. In this, I am only saying what was said

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by Lord Sterndale in *Currie* v. *Inland Revenue Commissioners*[9] and repeated by Atkin L.J. in *Cooper* v. *Stubbs*.[10] And, in Scotland, Lord Sands says the same thing in *Inland Revenue Commissioners* v. *Livingston*.[11] I agree with them. But, of course, in proper circumstances a case can be described as one of fact, or as purely one of fact (if the testimonial adds anything), without going through the procedure of explaining that is so because it is one of degree and, the facts fairly admitting of the determination come to, there is no error which justifies the court's intervention. I see nothing more than this in anything that was said in this House in *Jones* v. *Leeming*.[12] The only thing that I would deprecate is too much abbreviation in stating the question, as by asserting that it is simply a question of fact whether or not a trade exists. It is not simply a question of fact. The true clue to the understanding of the position lies, I think, in recalling that the court can allow an appeal from the commissioners' determination only if it is shown to be erroneous in point of law.

Nor do I think that there can be any real divergence of opinion as to what constitutes error of law for this purpose. Naturally, judges have not always expressed it in exactly the same terms. I will take one or two instances. As I have said, where there is an actual statement in the case which shows a misconception of the law, no one feels any difficulty. But, equally, no one supposes that the court's right, or as I would say, duty, to intervene stops at this. For example, in *Cooper* v. *Stubbs*,[13] Rowlatt J. was prepared to overrule the commissioners' determination that no trade existed because, as he said: "If one were trying a question of this sort with a jury, one "would have to say upon these facts, 'Well, now a trade is "'proved,' and I think that what the commissioners have done "is merely to give the wrong name to a state of facts which in "law amount to something else." In the Court of Appeal[14] the majority did not agree with him, holding, in effect, that it would not have been right to give such a direction to the jury on the facts as found. We are not rehearing the case of *Cooper* v. *Stubbs*,[14] though one can say, at any rate, "sed victa Catoni." But I see no reason to think that the majority were following any different principle. Warrington L.J. said[15] that intervention was proper only "in a very clear case, where either the Commissioners have come to their conclusion without evidence which "should support it, that is to say, have come to a conclusion "which on the evidence no reasonable person could arrive at, or "have misdirected themselves in point of law." And Atkin L.J. recognized[16] that "there may be a state of facts which can "only lead to one conclusion of law." Now, if I turn to the Scottish decisions I find that the judges are stating, though sometimes in somewhat different words, the same principle. Lord Normand's judgment in the First Division of the Court of Session in *Inland Revenue Commissioners* v. *Fraser*[17] has said almost everything that needs to be said on this branch of the subject. "In cases," he says, "where it is competent for a "tribunal to make findings in fact which are excluded from "review, the Appeal Court has always jurisdiction to intervene "if it appears either that the tribunal has misunderstood the "statutory language—because a proper construction of the "statutory language is a matter of law—or that the tribunal has "made a finding for which there is no evidence or which is "inconsistent with the evidence and contradictory of it." And that, in its turn, appears to me to propound the same principle as that adopted by Lord Cooper in *Inland Revenue Commissioners* v. *Toll Property Co. Ld.*,[18] where he says: "Keeping in "view the nature of the transaction, the purpose with which the "company was floated and the objects which were prescribed in "the memorandum of association, and the whole of the other "circumstances which I have briefly summarized, it seems to "me that the majority of the commissioners were not entitled "to reach the conclusion which they did, that they must have "misdirected themselves in law, and that the true and only "reasonable conclusion on the facts found is the conclusion "reached by the dissenting commissioner."

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[9] [1921] 2 K.B. 332; 37 T.L.R. 371.

[10] [1925] 2 K.B. 753, 772–3.

[11] 1927 S.C. 251, 258; 11 T.C. 538, 545–6.

[12] [1930] A.C. 415.

[13] (1925) 133 L.T. 582, 585; 41 T.L.R. 345.

[14] [1925] 2 K.B. 753.

My Lords, I must apologise for taking so much time to repeat what I believe to be settled law. But it seemed to be desirable to say this much, having regard to what appears in the judgments in the courts below as to a possible divergence of principle between the English and Scottish courts. I think that the true position of the court in all these cases can be shortly stated. If a party to a

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[15] [1925] 2 K.B. 753, 768.

[16] Ibid. 772.

[17] 1942 S.C. 493, 497–8; 24 T.C. 498, 501.

[18] 1952 S.C. 387, 393; 34 T.C. 13, 18–9.

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hearing before commissioners expresses dissatisfaction with their determination as being erroneous in point of law, it is for them to state a case and in the body of it to set out the facts that they have found as well as their determination. I do not think that inferences drawn from other facts are incapable of being themselves findings of fact, although there is value in the distinction between primary facts and inferences drawn from them. When the case comes before the court it is its duty to examine the determination having regard to its knowledge of the relevant law. If the case contains anything ex facie which is bad law and which bears upon the determination, it is, obviously, erroneous in point of law. But, without any such misconception appearing ex facie, it may be that the facts found are such that no person acting judicially and properly instructed as to the relevant law could have come to the determination under appeal. In those circumstances, too, the court must intervene. It has no option but to assume that there has been some misconception of the law and that this has been responsible for the determination. So there, too, there has been error in point of law. I do not think that it much matters whether this state of affairs is described as one in which there is no evidence to support the determination or as one in which the evidence is inconsistent with and contradictory of the determination, or as one in which the true and only reasonable conclusion contradicts the determination. Rightly understood, each phrase propounds the same test. For my part, I prefer the last of the three, since I think that it is rather misleading to speak of there being no evidence to support a conclusion when in cases such as these many of the facts are likely to be neutral in themselves, and only to take their colour from the combination of circumstances in which they are found to occur.

If I apply what I regard as the accepted test to the facts found in the present case, I am bound to say, with all respect to the judgments under appeal, that I can see only one true and reasonable conclusion. The profit from the set of operations that comprised the purchase and sales of the spinning plant was the profit of an adventure in the nature of trade.

What other word is apt to describe the operations? Here are two gentlemen who put their money, or the money of one of them, into buying a lot of machinery. They have no intention of using it as machinery, so they do not buy it to hold as an income-producing asset. They do not buy it to consume or for the pleasure of enjoyment. On the contrary, they have no intention of holding their purchase at all. They are planning to sell the machinery even before they have bought it. And in due course they do sell it, in five separate lots, as events turned out. And, as they hoped and expected they make a net profit on the deal, after charging all expenses such as repairs and replacements, commissions, wages, travelling and entertainment and incidentals, which do in fact represent the cost of organizing the venture and carrying it through.

This seems to be, inescapably, a commercial deal in secondhand plant. What detail does it lack that prevents it from being an adventure in the nature of trade, or what element is present in it that makes it capable of being aptly described as anything else? Well, to judge by the respondents' contentions as recited in the case, there were some circumstances lacking in this deal of which the presence has been regarded as of importance in other cases. I do not think that this line of argument is ever very conclusive; but, in any event, it breaks down completely on the facts that are found. It is said that there was no organization for the purposes of the transaction. But in fact there was organization, as much of it as the transaction required. It is true that the plant was not advertised for sale, though advertisements asking for plant were answered by the respondents. But why should they incur the cost of advertising if they judged that they could achieve the sale of the plant without it? It is said that no work had been done on the maturing of the asset to be sold. But such replacement and renovation as were needed were in fact carried out, and I can see no reason why a dealer should do more work in making his plant saleable than the purposes of sale require. It is said that neither of the respondents had any special skill from his normal activities which placed him in an advantageous position for the purposes of this transaction. It may be so, though one of them was the employee of a spinning firm. In any case the members of a commercial community do not need much instruction in the principles and possibility of dealing, and I think that, given the opportunity, the existence or non-existence of special skill is of no significance whatever. It is said, finally, that the purchase and sale of plant lent itself to capital, rather than commercial, transactions. I am not sure that I understand what this is intended to mean. If it means that at the relevant period there was no market for secondhand plant in which deals could take place, there is no finding to that effect and all the facts that are recited seem to be against the contention. If it means anything else, it is merely an attempt to describe the conclusion which the respondents would wish to see arrived at on the whole case.

There remains the fact which was avowedly the original ground of the commissioners' decision—" this was an isolated case." But, as we know, that circumstance does not prevent a transaction which bears the badges of trade from being in truth an adventure in the nature of trade. The true question in such cases is whether the operations constitute an adventure of that kind, not whether they by themselves or they in conjunction with other operations, constitute the operator a person who carries on a trade. Dealing is, I think, essentially a trading adventure, and the respondents' operations were nothing but a deal or deals in plant and machinery.

There is only one thing more that I wish to add. The appeal was presented to us as involving a question of great importance, since it offered an opportunity of reconciling what were thought to be divergences between the views of the English and Scottish courts as to their jurisdiction in dealing with cases stated which involve the existence or non-existence of a " trade " under Case I of Schedule D. As I have tried to show, I do not think that there has been any such divergence of principle. But I do not feel equally confident that there has not been some divergence in the understanding and application of the governing principles. I find it difficult to think that, had there not been, the Crown would have been appellant in the present case.

I think it possible that the English courts have been led to be rather over-ready to treat these questions as " pure questions of " fact " by some observations of Warrington and Atkin L.JJ. in *Cooper* v. *Stubbs*.[19] If so, I would say, with very great respect, that I think it a pity that such a tendency should persist. As I see it, the reason why the courts do not interfere with commissioners' findings or determinations when they really do involve nothing but questions of fact is not any supposed advantage in the commissioners of greater experience in matters of business or any other matters. The reason is simply that by the system that has been set up the commissioners are the first tribunal to try an appeal, and in the interests of the efficient administration of justice their decisions can only be upset on appeal if they have been positively wrong in law. The court is not a second opinion, where there is reasonable ground for the first. But there is no reason to make a mystery about the subjects that commissioners deal with or to invite the courts to impose any exceptional restraints upon themselves because they are dealing with cases that arise out of facts found by commissioners. Their duty is no more than to examine those facts with a decent respect for the tribunal appealed from and if they think that the only reasonable conclusion on the facts found is inconsistent with the determination come to, to say so without more ado.

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[19] [1925] 2 K.B. 753.

I agree that the appeal should be allowed.

LORD TUCKER. My Lords, I agree, for the reasons which have been stated, that this appeal should be allowed.

LORD SOMERVELL OF HARROW. My Lords, I have had the advantage of reading the opinion of my noble and learned friend Lord Radcliffe, in which I concur.

Appeal allowed.

Solicitors: *Solicitor of Inland Revenue; Iliffe, Sweet & Co. for Laycock, Dyson & Laycock, Huddersfield.*

[HOUSE OF LORDS.]

CAMILLE AND HENRY DREYFUS FOUNDATION INC. . . . . APPELLANTS;

AND

INLAND REVENUE COMMISSIONERS . RESPONDENTS.

H. L. (E.)*
1955
July 5, 6, 28.

Revenue — Income tax — Charity — Foreign body — Corporation incorporated abroad for charitable purposes only—Whether entitled to exemption from income tax — "Any body of persons or trust "established for charitable purposes only"—Meaning—"Trust"—Application to Scotland—Income Tax Act, 1918 (8 *&* 9 *Geo.* 5, *c.* 40), *s.* 37 (1).
Trust—Scotland.

The exemption from income tax in section 37 (1) (*b*) of the Income Tax Act, 1918, is limited to a body of persons or trust established in the United Kingdom for charitable purposes only and excludes a body or trust established elsewhere.

Inland Revenue Commissioners v. *Gull* (1937) 54 T.L.R. 52; [1937] 4 All E.R. 290 considered.

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[*] *Present*: LORD MORTON OF HENRYTON, LORD PORTER, LORD NORMAND, LORD KEITH OF AVONHOLM and LORD SOMERVELL OF HARROW.

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Per Lord Normand. The term "trust" in section 37 (1) (*b*) must be understood in a sense which embraces trusts under both the English and the Scottish systems of law and does not connote any specialties of the English law.

Decision of the Court of Appeal [1954] Ch. 672; [1954] 2 All E.R. 466 affirmed.

APPEAL from the Court of Appeal (Evershed M.R., Jenkins and Hodson L.JJ.).

This was an appeal from an order of the Court of Appeal dated June 3, 1954, dismissing an appeal by the appellant, the Camille and Henry Dreyfus Foundation Inc., from an order of the Chancery Division (Wynn-Parry J.) dated February 18, 1954, whereby an appeal by the appellant on a case stated for the opinion of the High Court by the Commissioners for the Special Purposes of the Income Tax Acts was dismissed and their decision was confirmed.

The appellant was a corporation incorporated under the Membership Corporation Law of the State of New York in the United States of America. In the years 1946–47 to 1950–51 inclusive it received substantial patent royalties from an English company, British Celanese Ld., income tax being deducted on payment by the company. The primary purpose of the corporation was "to advance the science of chemistry, chemical engineering "and related sciences as a means of improving human relations "and circumstances throughout the world." The question in this appeal was whether section 37 (1) (*b*) of the Income Tax Act, 1918,[1] operated to exempt the appellant from the payment of income tax on the royalties.

F. Heyworth Talbot Q.C. and *Shelbourne* for the appellant corporation. The corporation is entitled to claim as a charity exemption from United Kingdom income tax under section 37 of the Income Tax Act, 1918, and section 19 (1) of the Finance Act, 1925. It was "established for charitable purposes only" within section 37 (1) (*b*), although it was not established in the United Kingdom. This is an exempting section and its scope must be defined by reference to the incidence of the tax from which it provides exemption. This produces a reasonable result.

As to the meaning of the word "established," see *Inland*

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[1] Income Tax Act, 1918, s. 37: "(1) Exemption shall be granted— ". . . (*b*) from tax . . . under "Schedule D in respect of any yearly "interest or other annual payment, "forming part of the income of any "body of persons or trust established "for charitable purposes only, . . ."

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Revenue Commissioners v. *Yorkshire Agricultural Society.*[2] It is not a term of art and means "formed with some degree of "permanence." On the language of section 37 (1) (*b*), taking the words as they stand, reading nothing in and omitting nothing, one has here a "body of persons" which is "established" for purposes which the commissioners have held to be "charitable." Thus every requirement of the section is satisfied. It is enough to say that this is an established body of persons whose purposes are charitable. There is no justification for reading in a limiting phrase to diminish the tax relief and to exclude a body incorporated by foreign law. The whole emphasis in the Crown case is on the necessity for establishment in the United Kingdom, not on the place where the benefits are conferred. The whole of the funds might be expended to advance education in England and it would be anomalous if tax relief were excluded because the corporation was not established there.

The Income Tax Act, 1918, is a consolidating Act. The history of the sources of the relevant provision does not justify the presumption that it applies only to bodies of persons domiciled in the United Kingdom. By the Income Tax Act, 1799, the charge was laid on each person in respect of the totality of his income and there was no deduction at source, this being introduced later by Addington's Act, the Income Tax Act, 1803, which cast income tax into its modern form establishing the five Schedules. The first use of the phrase "established for charitable "purposes only" is in section 5 of the Act of 1799, which confers complete exemption. There is no reference to trusts: see also sections 87 and 88. Schedule D in the Act of 1803 extended the charge to foreigners not resident in Great Britain. For exceptions of bodies established for charitable purposes only, see section 31, Schedule A, No. IV, and section 68. Too much importance should not be attached to section 71. The Income Tax Act, 1806, is substantially the same as the Act of 1803. In the Income Tax Act, 1842, see section 61, Schedule A, No. VI, section 66, Schedule C, rule 3, and section 105, relating to Schedule D. The expression "body of persons or trust" in section 37 (1) (*b*) of the Act of 1918 should not operate to limit its meaning to the United Kingdom even if there is something characteristically English about the expression "trust," which is not conceded.

The word "established" has not any special significance to distinguish between trusts established here and trusts established abroad. The definition of "body of persons" in section 237 of the Act is not so limited and shows that it is not a term of art. The expression is used quite generally in rule 1 of the All Schedules Rules which, read with paragraph 1 (*m*) (iii) of Schedule D, shows that a foreign body of persons is a body of persons within the Act for the purposes of the charge to tax under Case III of Schedule D.

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[2] [1928] 1 K.B. 611; 44 T.L.R. 59.

As to the charitable aspect of the case, see *Commissioners for the Special Purposes of the Income Tax* v. *Pemsel*[3] and *In re Robinson.*[4] One should not read something into a statute just because one thinks that the result of not doing so would not be what, on general grounds, one would expect. It would be inconceivable to hold that the "save the children" fund was not charitable although it was directed to helping children in less favoured parts of the world than England. The spread of education in Switzerland would in the long view be of advantage to the United Kingdom, just as would the spreading of morality and the relief of poverty in any part of the world, because these would in the long view operate to the advantage of the community here. It is not true as a general proposition that a foundation would not be charitable within the Act because its income was not applicable to charitable purposes in the United Kingdom, although the purposes were charitable according to the law of the United Kingdom. But here the income is so applicable, although it has not so far been applied in that way. When the Act refers to a person carrying on a trade it does not mean only a person carrying on a trade within the jurisdiction of the English courts. An American trust for the Cathedral of New York, holding investments in England, would be within the exception. The phrase "body of persons" covers any body which has some degree of permanence and its scope need not be limited to such a body in this country.

There is no ambiguity in the words to be construed here. As to ambiguity in a statute, see *Kirkness* v. *John Hudson & Co. Ld.*[5] Ambiguity exists when words taken in their context are equally capable of two meanings and cannot be construed otherwise than as having two meanings. Difficulty of construction and doubt as to the meaning of words does not necessarily amount to ambiguity.

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[3] [1891] A.C. 531.

[4] [1931] 2 Ch. 122; 47 T.L.R. 264.

[5] [1955] 2 W.L.R. 1135, 1141, 1151, 1154, 1163; [1955] 2 All E.R. 345.

There is no limitation inherent in the words "body of persons "or trust established for charitable purposes only."

The sections from the Finance Act, 1950, referred to by Evershed M.R. in the court below,[6] do not bear on this case.

Jenkins L.J. in the Court of Appeal[7] summarizes the appellants' argument accurately and fairly.

Sir Reginald Manningham-Buller Q.C., A.-G., Borneman Q.C., Sir Reginald Hills and *E. B. Stamp*, for the respondents, were not called on to argue.

Their Lordships took time for consideration.

July 28. LORD MORTON OF HENRYTON. My Lords, the appellant foundation was incorporated under the Membership Corporation Law of the State of New York in the United States of America. In the years 1946–47 to 1950–51 inclusive the foundation received substantial royalties from British Celanese Ld. It is not in doubt that the foundation is liable to pay income tax on these royalties under Schedule D unless it can establish that it is entitled to exemption under the provisions of section 37 of the Income Tax Act, 1918.

That section is in the following terms: "Exemption shall "be granted—(*a*) from tax under Schedule A in respect of the "rents and profits of any lands, tenements, hereditaments, or "heritages belonging to any hospital, public school or almshouse, "or vested in trustees for charitable purposes, so far as the "same are applied to charitable purposes only: Provided that "any assessment upon the respective properties shall not be "vacated or altered, but shall be in force and levied, notwithstanding the allowance of any such exemption; (*b*) from tax "under Schedule C in respect of any interest, annuities, dividends or shares of annuities, and from tax under Schedule D in "respect of any yearly interest or other annual payment, forming "part of the income of any body of persons or trust established "for charitable purpose only, or which, according to the rules "or regulations established by Act of Parliament, charter, decree, "deed of trust, or will, are applicable to charitable purposes "only, and so far as the same are applied to charitable purposes "only; (*c*) from tax under Schedule C in respect of any interest, "annuities, dividends or shares of annuities, in the names of "trustees, applicable solely towards the repairs of any cathedral,

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[6] [1954] Ch. 672, 690; [1954] 2 All E.R. 466.

[7] [1954] Ch. 672, 700–1.

"college, church or chapel, or any building used solely for the "purpose of divine worship, and so far as the same are applied "to those purposes."

The foundation claims that it is a "body of persons . . . "established for charitable purposes only" and therefore comes exactly within the words of subsection (1) (*b*) of section 37. It is not in dispute that the foundation is "established" in the United States of America, and the first question which arises for decision is whether (as the foundation contends) the words just quoted cover a body of persons or trust "established for "charitable purposes only" in any part of the world, or are limited (as the Crown contends) to a body of persons or trust established for the like purposes in the United Kingdom. If the former view is correct, a further question will arise, viz., whether the objects of the foundation, as expressed in its certificate of incorporation, are exclusively charitable purposes. It has rightly been conceded on behalf of the foundation that this question has to be decided according to the law of England.

The first question was considered by Lawrence J. (as he then was) in the case of *Inland Revenue Commissioners* v. *Gull.*[1] That learned judge felt himself constrained, by reason of the terms of certain later enactments, to hold that the exemption afforded by section 37 (1) (*b*) "applies only to the income of "bodies of persons or trusts established in the United Kingdom," although he decided in favour of the taxpayer on the ground that the trust there in question was in fact established in the United Kingdom. The later enactments which so constrained the learned judge are referred to by Jenkins L.J. in his judgment in the present case, in terms which I gratefully adopt[2]: "The "consideration, which Lawrence J. regarded as constraining him "to construe section 37 as he did, was the legislative interpreta- "tion placed on section 37 by section 21 of the Finance Act, "1923, which provided for the exemption of charities in the Irish "Free State in respect of income tax for the year 1923–24, and "by section 32 of the Finance Act, 1924, and section 21 of the "Finance Act, 1925, which respectively provided for a like "exemption for the years 1924–25 and 1925–26, 1926–27 and "1927–28, and finally by the Finance Act, 1926, section 23, and "Part II of the Second Schedule to that Act which provided "under paragraph 3 of the latter that 'section 21 of the Finance "'Act, 1925, which grants an exemption for charities in the

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[1] (1937) 54 T.L.R. 52, 53; [1937] 4 All E.R. 290.

[2] [1954] Ch. 672, 695–6; [1954] 2 All E.R. 466.

" 'Irish Free State shall cease to have effect.' To appreciate " the force of this consideration it is necessary to read at length " section 21 of the Finance Act, 1923." Jenkins L.J. read the section, which is in the following terms: " Subject as hereinafter " provided, section 37 of the Income Tax Act, 1918 (which grants " exemption in respect of charities), shall, in the case of rents " and profits of any lands, tenements, hereditaments, or heritages " belonging to any hospital, public school, or almshouse in the " Irish Free State, or vested in trustees in the Irish Free State " for charitable purposes, and in the case of a body of persons or " trust established in the Irish Free State for charitable purposes " only, and in the case of income which according to rules or " regulations established by Act of Parliament, charter, decree, " deed of trust or will in the Irish Free State, is applicable to " charitable purposes only, or which, in the names of trustees in " the Irish Free State, is applicable solely towards the repairs of " any cathedral, college, church or chapel, or any building used " solely for the purpose of divine worship, apply, as respects " income tax chargeable for the year 1923–24, as if the Irish Free " State had not been constituted: Provided that this section shall " not apply except where the lands, tenements, hereditaments, or " heritages belonged to the hospital, public school, or almshouse, " or were vested in the trustees, on April 5, 1923, or the interest, " annuities, dividends, shares of annuities, yearly interest or other " annual payment arise from investments which were held by the " body of persons, trust, or trustees, or were subject to rules or " regulations as aforesaid, on April 5, 1923." The learned Lord Justice then observed: " It is clear that, for the purposes of " this section and the subsequent legislation on the same topic, " it was assumed that the exemption afforded by section 37 to " bodies of persons or trusts established for charitable purposes " only was limited to bodies of persons or trusts established in " the United Kingdom, and that the secession of the Irish Free " State from the United Kingdom would consequently have the " effect of depriving bodies of persons or trusts established in " the Irish Free State of the exemption in the absence of legislation continuing it in their favour."

The foundation's claim to exemption under section 37 (1) (*b*) was rejected by the Special Commissioners. They felt that they were bound by the decision of Lawrence J. in *Gull's* case,[3] and accordingly held that the exemption applied only to the income

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[3] 54 T.L.R. 52.

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of bodies of persons or trusts established in the United Kingdom. Wynn-Parry J. took the same view. The Court of Appeal, not being bound by *Gull*'s case,[3] considered the matter fully, and dismissed the appeal. The main points of the argument presented to the Court of Appeal by Mr. Heyworth Talbot were summarized by Jenkins L.J. in his judgment.[4] The argument followed the same lines in this House and counsel accepts that summary as being fair and accurate.

My Lords, the question now before the House is one which turns upon the language of the relevant statute. It is at once apparent that the phrase in section 37 (1) (*b*) "any body of "persons or trust established for charitable purposes only" is not expressly limited to bodies of persons or trusts established in the United Kingdom, but the Court of Appeal held that it should be construed as being so limited. This conclusion was based entirely upon a consideration of the true construction of the Act of 1918, and your Lordships have had the advantage of reading and considering three full and clear judgments delivered in the Court of Appeal, expressing this view and dealing very fully with the argument presented by Mr. Heyworth Talbot in that court and in your Lordships' House. I agree with the conclusion reached by the Court of Appeal, and as no question of principle arises in this case, and my reasons are in substance the same as those appearing in the judgments of that court, I shall not detain your Lordships by setting them out in my own words.

I shall only add that if I had been of opinion that the words in question were "open to two perfectly clear and plain con-"structions" (to quote Lord Buckmaster in *Ormond Investment Co. Ld.* v. *Betts*[5]) I should have felt no hesitation in deciding that the Crown's construction gave effect to the intention of the legislature, having regard to the language of the later enactments to which I have already referred.

As your Lordships did not find it necessary to call upon counsel for the respondents to present any argument, I express no opinion upon the question whether the objects of the foundation are exclusively charitable purposes according to the law of the United Kingdom. This question does not arise if your Lordships agree with my opinion upon the first question, but the Special Commissioners answered it in the affirmative, and the Court of Appeal saw no good reason for disturbing that finding.

I move that the appeal be dismissed with costs.

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[3] 54 T.L.R. 52.

[4] [1954] Ch. 672, 700–1.

[5] [1928] A.C. 143, 154.

LORD PORTER. My Lords, I agree with the opinion which has just been expressed by the noble Lord on the Woolsack, and I also agree with the opinion, about to be expressed, of my Lord Normand which I have had an opportunity of reading.

LORD NORMAND. My Lords, I agree with the speech delivered by my noble and learned friend on the Woolsack.

I have only a few observations to add. They are prompted by a passage in the judgment of the Master of the Rolls on the word "trust." He says [6] that in section 37 (1) (*b*) of the Income Tax Act, 1918, "the word 'trust' is a word peculiarly referable "to our own system of law. It is true that to other countries, "which have adopted our own legal system and essential "characteristics, the word 'trust' would have a precise and "certain significance. But if the foundation's argument is sound, "the formula in question should have a universal application, so "that the term 'body of persons or trust' would be intelligible "in reference to countries other than those which have embraced "our legal conceptions." It seems that in this passage "our "own system of law" and "our legal conceptions" must mean the English system of law and English legal conceptions. He says elsewhere,[7] following the same train of ideas, that it is "a "significant characteristic of our system that to the Attorney-"General representing the Crown, as parens patriae, belongs the "right and duty of invoking the powers of the courts to secure "the due execution of charitable trusts," and there it is clearly the English system that he has in mind, for it goes without saying that the Attorney-General has no right to invoke the powers of the courts beyond the boundary of England, and in Scotland the Lord Advocate has no general right or duty to intervene comparable to the right and duty of the Attorney-General in England.

It should be beyond doubt that Scottish trusts are "trusts" within the meaning of that term as used in section 37 (1) (*b*). The history of the origin and development of the law of trusts in Scotland is not at all the same as the history of the origin and development of the law of trusts in England, and since the term "trusts" applies proprio vigore and without any interpretation clause to Scottish trusts, it must be understood in a sense which embraces trusts under both systems of law, and must not be held to connote any specialties of the English law. For this reason it must cover the case in which a fund is held as their property in law by persons who are directed to hold it, subject to purposes which operate as a qualification of their rights and constitute a burden on the property preferable to all claims by or through them, and subject also to a reversionary right remaining with the truster, his heirs and assignees, so far as the estate is not exhausted by the purposes. I do not put forward this as a definition of "trust," but it is a description of a typical trust according to Scots law, and it contains, I believe, nothing repugnant to the English conception of trust. If, however, "trust" must be understood in so general a sense as this, it may well be impossible to deny that it is a term which would be intelligible in reference to many other systems of law which do not derive from the law of England.

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[6] [1954] Ch. 672, 686.

[7] Ibid. 684.

I respectfully accept Jenkins L.J.'s statement[8] that "'trust' ". . . must be taken as referring to trusts taking effect and "enforceable under the law of the United Kingdom." This statement of the meaning of "trust" depends on the context of section 37, and not on the connotation of the word "trust" alone.

I have dealt with this point at greater length than is necessary for the purpose of deciding this appeal, because difficulty enough has already been created for the courts in Scotland by the duty to apply characteristically English law in determining whether a Scottish trust is for the purpose of income tax a charitable trust, and it would be a great misfortune if any shadow of suspicion were to arise that a Scottish trust could not enjoy the benefits of section 37 (1) (*b*) unless it possessed the special characteristics of a trust under the law of England.

LORD KEITH OF AVONHOLM. My Lords, I agree that this appeal fails, for the reasons stated by my noble and learned friend on the Woolsack. I would only add that I concur in the observations made by my noble and learned friend, Lord Normand.

LORD SOMERVELL OF HARROW. My Lords, I have had the advantage of reading the opinion that has just been delivered by my noble and learned friend on the Woolsack. I agree with it and do not desire to add anything to it.

Appeal dismissed.

Solicitors: *Linklaters & Paines; Solicitor of Inland Revenue.*

F. C.

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[8] [1954] Ch. 672, 706.

SAMUEL ALADESURU AND OTHERS . . APPELLANTS;

AND

THE QUEEN . . . . RESPONDENT.

J. C.*
1955
July 27;
Oct. 19.

ON APPEAL FROM THE WEST AFRICAN COURT OF APPEAL.

West Africa—Criminal law—Appeal—Grounds—"That judgment "against weight of evidence"—Inaccurate phrase—Strict compliance with statutory language essential—That "verdict . . . is "unreasonable or cannot be supported having regard to the "evidence"—West African Court of Appeal Ordinance (Laws of Nigeria, 1948, *c.* 229), *ss.* 10, 11 (1).

Criminal Law—Appeal—Grounds of appeal—"Against weight of "evidence"—Inaccurate phrase.

The West African Court of Appeal Ordinance (Laws of Nigeria, 1948, c. 229), provides in section 11, which follows the language of the English Criminal Appeal Act, 1907, that: "The Court of "Appeal on any such appeal [from the Supreme Court] against "conviction shall allow the appeal if they think that the verdict "should be set aside on the ground that it is unreasonable or "cannot be supported having regard to the evidence . . ."

The appellants, having been convicted by the Supreme Court of Nigeria on charges of knowingly as directors of a bank making and publishing a false balance sheet, stated as the first ground of appeal in their application for leave to appeal to the West African Court of Appeal, which was granted by that court, "that "judgment is against the weight of evidence." At the hearing of the appeal the Court of Appeal struck out that ground, among others, as being "no ground of appeal in criminal matters":—

Held, that in order to succeed an appellant must show, in the words of the statute, that the verdict is "unreasonable or cannot be "supported having regard to the evidence." It is not a sufficient ground of appeal to allege that "the verdict is against the weight "of evidence"; that phrase is inaccurate and cannot properly be substituted for the words of the statute. The Ordinance gave no appeal on such ground, and the Court of Appeal was entitled to require strict observance of its provisions, but that did not mean that in a proper case the Court of Appeal would not give leave to appeal or review the evidence if a prima facie case was shown that the verdict appealed from was one which no reasonable tribunal could have arrived at.

Statement in Archbold's Criminal Pleading, Evidence and Practice, 33rd ed., at p. 346, that "it is not a sufficient ground of "appeal to allege that the verdict is against the weight of evidence," approved.

Judgment of the West African Court of Appeal affirmed.

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* *Present*: LORD TUCKER, LORD SOMERVELL OF HARROW and MR. L. M. D. DE SILVA.

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APPEAL (No. 45 of 1954), by special leave, from a judgment of the West African Court of Appeal (July 29, 1953), affirming a judgment and sentence of the Supreme Court of Nigeria (May 11, 1953).

The following facts and statutory provisions are taken from the judgment of the Judicial Committee: The appellants were convicted in the Supreme Court of Nigeria on two counts of an indictment which charged them being directors of the Standard Bank of Nigeria Ld. in one count with making, and the other with publishing, the balance sheet of the bank as at March 31, 1952, showing certain particulars which were false to their knowledge with intent to deceive any member, shareholder or creditor of the bank contrary to section 436 (*a*) of the Criminal Code (Laws of Nigeria, 1948). Their appeal to the West African Court of Appeal was dismissed and they were granted special leave to appeal therefrom by Order-in-Council dated April 13, 1954.

The main ground of appeal was that the West African Court of Appeal had struck out certain of the appellants' grounds of appeal in their notice of application for leave to appeal without hearing argument thereon, and had thereby deprived the appellants of a right of appeal granted by statute whereby justice had been denied to them. The ground with regard to which particular complaint was made was ground No. 1 of the notice dated May 11, 1953, which was "that judgment is against the weight of "evidence."

Section 10 of the West African Court of Appeal Ordinance (Laws of Nigeria, 1948, cap. 229) gave a right of appeal from convictions by the Supreme Court as follows:—

"10. A person convicted by or in the Supreme Court . . . "may appeal to the Court of Appeal—

"(*a*) against his conviction on any ground of appeal which "involves a question of law alone; and

"(*b*) with the leave of the Court of Appeal, or upon the certificate of the judge who tried him . . . that it is a fit case for "appeal against his conviction on any ground of appeal which "involves a question of fact alone, or a question of mixed law "and fact, or any other ground which appears to the court to be "a sufficient ground of appeal."

Section 11 provided: "(1) The Court of Appeal on any such "appeal against conviction shall allow the appeal if they think "that the verdict should be set aside on the ground that it is "unreasonable or cannot be supported having regard to the "evidence or that the judgment of the court before which the "appellant was convicted should be set aside on the ground of "a wrong decision of any question of law or that on any ground "there was a miscarriage of justice, and in any other case shall "dismiss the appeal."

In their judgment the West African Court of Appeal (Verity C.J., Jibowu and Hurley JJ.) stated: "The first ground of appeal "that 'judgment is against the weight of evidence' is no ground "of appeal in criminal matters but is an appropriate ground in "civil matters where verdicts are to be arrived at by preponder"ance of evidence. In criminal matters the proper ground of "appeal is that 'the verdict is unreasonable or cannot be "'supported having regard to the evidence.' . . . Even if we "had granted an amendment of the ground of appeal, we would "not have been disposed to hear arguments on facts."

July 26, 27. *Christopher Shawcross Q.C.* and *David Kemp* for the appellants. The West African Court of Appeal having granted to the appellants leave to appeal on five grounds then proceeded to strike out certain of them, including the ground that "the judgment is against the weight of evidence," and without allowing or hearing argument thereon dismissed their appeal. That, it is submitted, deprived the appellants of a right of trial granted by statute and amounted to a denial of justice. It was equivalent to a Court of Appeal being empowered by statute to hear appeals and refusing to do so. That is the main ground of this appeal. The second point is that there was no evidence or no sufficient evidence such as is required to prove that the appellants held the position of directors of the Standard Bank of Nigeria, which was an essential element in the charges against them. If the Court of Appeal desired to treat the notice of application for leave to appeal as notice of appeal, as they appear to have done, they should have permitted the appellants to amend their notice, if the court thought that it required amendment, so as to conform to the terms of section 11 of the West African Court of Appeal Ordinance by alleging that the decision was "unreasonable or cannot be supported having regard to the evidence." The Court of Appeal, in not giving full opportunity to amend, was refusing to hear their substantial appeal on a pure technicality, and that, it is submitted, amounts to a denial of justice. They were failing to carry out their statutory duty; the statute specifically enjoins that the court shall consider the evidence; and not to hear arguments is even worse in a criminal case.

The words in the statute, "the verdict should be set aside "on the ground that it is unreasonable or cannot be supported "having regard to the evidence," have been interpreted in England as meaning "against the weight of the evidence." The greater includes the less, and the greater ground is "against the "weight of the evidence." [Reference was made to *Rex* v. *Ashford* [1]; *Metropolitan Railway Co.* v. *Wright* [2]; *Rex* v. *Williamson* [3]; *Rex* v. *Munns* [4]; *Rex* v. *Burke* [5]; *Rex* v. *Wallace* [6]; *Reg.* v. *Tucker* [7]; *Rex* v. *Armstrong* [8]; *Rex* v. *Margulas* [9]; *Rex* v. *Weisz* [10]; *Rex* v. *Dent* [11]; *Rex* v. *Dollery* [12]; *Rex* v. *Hancox*,[13] and to Archbold's Criminal Pleading, Evidence and Practice, 33rd ed., p. 313.] This case is one where justice was manifestly not seen to have been done, because these appellants were put out of court on a technicality; they did not have the right which is prescribed by statute for their appeals to be heard and determined.

The second point—that it is not established that the appellants were directors of the bank—rests on the authorities and on the evidence. The evidence amounted to nothing more than that the appellants acted as de facto directors of the bank. That is not enough. There must be evidence that the appellants were properly appointed as directors and there was no such evidence. Reliance is placed on *Dean* v. *Hiesler*,[14] *Rex* v. *Lawson* [15] and *Reg.* v. *Atkins*.[16] See also *Gibson* v. *Barton*,[17] *In re Canadian Land Reclaiming and Colonizing Co.* (*Coventry and Dixon's* case) [18] and *Rex* v. *Stibbe*.[19] A penal section must be strictly construed, and when the Act says "being a director," it must be proved that the accused was a duly appointed director at the material time. As to whether there was strict proof, the evidence from which it is sought to be inferred that they were duly appointed consists of documents and acts of the appellants, but the determination of the shareholders, which, by paragraph 68 of Table A in the first schedule to the Companies Ordinance of Nigeria, is required to be in writing, was not produced. The strict rule of proof applies in criminal cases, especially where it is a statutory offence. The Court of Appeal said that it must be

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[1] (1908) 1 Cr.App.R. 185.
[2] (1886) 11 App.Cas. 152; 2 T.L.R. 553.
[3] (1908) 1 Cr.App.R. 3.
[4] (1908) 1 Cr.App.R. 4.
[5] (1908) 1 Cr.App.R. 245.
[6] (1931) 23 Cr.App.R. 32.
[7] (1952) 36 Cr.App.R. 192, 197.
[8] (1922) 16 Cr.App.R. 147, 149.
[9] (1922) 17 Cr.App.R. 3.
[10] (1920) 15 Cr.App.R. 85, 89, 93.
[11] (1943) 29 Cr.App.R. 120, 124.
[12] (1911) 6 Cr.App.R. 255.
[13] (1913) 8 Cr.App.R. 176.
[14] [1942] 2 All E.R. 340.
[15] [1905] 1 K.B. 541.
[16] (1900) 64 J.P. 361.
[17] (1875) L.R. 10 Q.B. 329, 341.
[18] (1880) 14 Ch.D. 660.
[19] Unreported (Nig., M.3530, 1949).

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presumed that they were directors. But there is no presumption in criminal cases.

J. G. Le Quesne for the respondent. It is submitted, first, that it is sufficient to make out a charge under section 436 of the Criminal Code to show that the accused person acted as a director, or, as some of the cases put it, as a de facto director, even though the evidence might show that he was never properly appointed as a director. Secondly, if that proposition is wrong, nevertheless there was evidence in this case sufficient to justify a finding that the appellants were properly appointed. On the first point reliance is placed on *Gibson* v. *Barton* [20] as showing that, so far as a manager is concerned, he may bring himself within the scope of such a section as that here by acting as manager, and the same principle would apply to a person who acted as a director without proper appointment. What is necessary under this section is to prove that a person acted de facto as a director. *Coventry and Dixon's* case [21] is relied on as giving strong support to the decision in *Gibson's* case,[22] and, indeed, as taking the matter further, because it is a case of directors. There was also, it is submitted, clear approval of the *Gibson* [22] and *Coventry* [23] cases in *In re Western Counties Steam Bakeries and Milling Co.*[24] *Edmonds* v. *Foster* [25] is important when considering the rather different point of what evidence is needed to show that a man is a director. [Reference was also made to *Rex* v. *Lawson* [26] and *Reg.* v. *Atkins.*[27]] *Dean* v. *Hiesler* [28] was not decided on any such statute as was discussed in the other cases, but upon a defence regulation; there he had to be proved a director in the strictest possible way, and that distinguishes that case from the others. Alternatively, if it cannot be distinguished, then, since the earlier authorities appear not to have been discussed, it is submitted that they should be preferred to the decision in *Dean's* case.[28] It is clear that the object of section 436 of the Criminal Code is to prevent people being misled by the circulation of false documents by officers of a company, and if one has people doing this as though they were directors, that is just as much within the mischief of the section as it would be if they had been properly appointed.

If this first point be wrong, and it is not sufficient for the

[20] L.R. 10 Q.B. 329.
[21] 14 Ch.D. 660.
[22] L.R. 10 Q.B. 329.
[23] 14 Ch.D. 660, 664, 673.
[24] [1897] 1 Ch. 617, 626; 13 T.L.R. 170, 276.
[25] (1875) 45 L.J.M.C. 41, 44.
[26] [1905] 1 K.B. 541, 546–9.
[27] 64 J.P. 361.
[28] [1942] 2 All E.R. 340.

appellants to be de facto directors, then it is submitted that the evidence as a whole—documentary and oral—justified the judge in finding that they had been properly appointed directors, whatever the proper mode of appointment was.

With regard to the other point—the goodness or badness of the grounds of appeal—the Court of Appeal were quite right in saying that "against the weight of evidence" was not a good ground, and also in saying what would have been a good ground—the words of the statute. The notice of appeal must state what the grounds of appeal are. If, contrary to the respondent's contention, the Court of Appeal was not entitled to strike out the grounds, the case ought to be remitted to that court for those grounds to be argued, and the Board should not quash the convictions.

Christopher Shawcross Q.C. in reply. *Rex* v. *Barnes*[29] shows that the Court of Criminal Appeal in this country has set aside the verdict of a jury not because it was against the weight of the evidence, but for a much lesser reason, namely, that it was unsatisfactory because the evidence was equally consistent with guilt and innocence. [*Rex* v. *Margulas*[30] was also referred to.] The argument for the respondent all stemmed from *Gibson's* case,[31] which was a case of a manager, and if he was acting as a manager he was managing. But a director is a director, as defined by the Act, and duly appointed. If he has never been appointed by a determination in writing, then he is not appointed. Secondary evidence could not be called. This is a penal statute and must be strictly construed. In a criminal case presumption is not enough.

July 27. LORD TUCKER announced that their Lordships would humbly advise Her Majesty that the appeal should be dismissed, and that they would give their reasons later.

October 19. Their Lordships' reasons for dismissing the appeal were delivered by LORD TUCKER, who stated the facts set out above and continued: It will be observed that the language of the West African Court of Appeal Ordinance follows that of the English Criminal Appeal Act, 1907, under which it has long been established that the appeal is not by way of rehearing as in civil cases on appeals from a judge sitting alone, but is a limited appeal which precludes the court from reviewing the

[29] (1942) 28 Cr.App.R. 141, 148.

[30] 17 Cr.App.R. 3.

[31] L.R. 10 Q.B. 329.

evidence and making its own valuation thereof. The position is correctly stated at page 346 of the 33rd edition of Archbold's Criminal Pleading, Evidence and Practice as follows: "In order "to succeed an appellant must show, in the words of the statute, "that the verdict is unreasonable or cannot be supported having "regard to the evidence. It is not a sufficient ground of appeal "to allege that the verdict is against the weight of evidence." It is also to be observed that an appeal on this ground does not lie as of right but only by leave of the court.

On the present appeal before the Board no attempt was made to establish that this case was one of the exceptional cases, a few of which have arisen from time to time in England, in which a criminal verdict has been set aside as one which no reasonable tribunal could have found. The complaint is that the Court of Appeal were wrong in ruling out ground No. 1 as incompetent or in the alternative that, if not stated with strict accuracy, it was a denial of justice to reject this ground merely because it bore "a wrong label."

Under the West African Court of Appeal Rules, 1950 (Rules of Court No. 2 of 1950), dealing with "Criminal Appeals," it is provided by rule 49 that where, on a notice of application for leave to appeal being duly served leave to appeal has been given, it shall not be necessary for the appellant to give any notice of appeal, but the notice of application for leave shall be deemed to be a notice of appeal.

In the present case the notice of application for leave was dated May 11, 1953, and contained five grounds. Having, no doubt, previously considered the application and the papers in the case, the court on July 21, 1953, announced that leave was granted. The notice of application accordingly became the notice of appeal, but the court was clearly entitled to reject any particular ground which was not within the terms of the statute. This they did with regard to ground No. 1. In their judgment they referred to the difference between civil and criminal appeals in this respect and added: "This difference has been pointed out "by this court times without number and so we have no sympathy "for any appellant who still puts up a wrong ground of appeal. "Even if we had granted an amendment of the ground of appeal "we would not have been disposed to hear arguments on facts." The court was entitled to require strict observance of the provisions of the statute so as to put a stop to attempts, which had evidently become prevalent, to review the findings of fact by the Supreme Court. The appellants were represented by counsel, and the notice of application for leave to appeal, although signed, as required by the rules, by the appellants personally, has every appearance of legal authorship. With regard to the reference to an amendment, there is nothing before their Lordships to show that counsel for the appellants in the Court of Appeal made any application to amend ground No. 1, so as to make it accord with the terms of the statute, or that at any stage he suggested that his real case was that the verdict was wholly unreasonable. But on any view it may well be that on the facts it was not a case in which any court would have given the necessary leave on the ground of unreasonableness, and in fact it was not contended to the contrary before their Lordships.

A number of cases, most of them from the early English Criminal Appeal Reports, were cited by counsel for the appellants in the headnotes of which the phrase "against the weight of "evidence" occurs with reference to applications to the Court of Criminal Appeal. It was submitted that this phrase had thus been treated as synonymous with "unreasonable or which cannot "be supported having regard to the evidence." There can be no doubt that this phrase is inaccurate and is one which cannot properly be substituted for the words of the statute, although it has in one or two cases found its way into the judgments, though always with qualifying language. It should by now be appreciated that the Nigerian Ordinance gives no appeal on such ground, but this does not mean that in a proper case the Court of Appeal will not give leave to appeal or review the evidence if a prima facie case is shown that the verdict appealed from is one which no reasonable tribunal could have arrived at.

Their Lordships do not sit as a Court of Criminal Appeal and it certainly has not been established in the present case that the West African Court of Appeal acted in a manner which would warrant their intervention by way of advice to Her Majesty on the ground of any fundamental defect in the administration of criminal justice.

There was a second ground of appeal which can be quite shortly dealt with. It was said that there was no sufficient evidence that the appellants were properly appointed directors of the Standard Bank of Nigeria Ld.

Paragraph 68 of Table A in the first schedule to the Companies Ordinance (chapter 38 of the Laws of Nigeria, 1948), which applies in this case, is as follows: "The number of the directors and the "names of the first directors shall be determined in writing by a "majority of the subscribers of the memorandum of association."

Section 76 (1) of the Companies Ordinance provides: "Every "company shall keep at its registered office a register containing "the names and addresses and the occupations of its directors or "managers, and send to the Registrar a copy thereof, and from "time to time notify to the Registrar any change among its "directors or managers."

It was contended on behalf of the appellants that the production of the determination in writing of the majority of the subscribers to the memorandum of association was the only proper proof of the appointment of the directors, and that no such document having been put in evidence no case had been made out by the prosecution. Documents marked "B," "C" and "D" were put in evidence. These were all statutory documents. "B" is the return required by section 76 and is dated October 11, 1950. It is signed by the appellant Aladesuru as director and contains the names of the other two appellants as directors. "C" is a similar return dated May 14, 1952, signed by the appellant Aladesuru as director and containing the names of the other two appellants as directors. "D" is a return of share capital and shares of the bank as required by Part II, section 27, of the Ordinance. It is presented and signed by Aladesuru as director and secretary and gives all three appellants as directors as at September 19, 1951. Another statutory document marked "E," signed and presented by the appellant Akinsanya as director and containing a return of allotments between August 28 and September 19, 1951, was also put in evidence. This document contains the names of all three appellants as allottees of 2,000 ordinary shares each. "H2," a share certificate dated December 22, 1951, signed by the appellant Ladejo as chairman and by the other two appellants as directors, and the original balance sheet, in respect of which the charges were laid, signed by the appellants, Aladesuru and Ladejo as directors and Akinsanya as manager, were also in evidence.

In conclusion there was the oral testimony of a witness named Enuodu, who was bills manager at the bank between August, 1950, and September, 1952, that all three appellants were directors of the bank during that period. None of the appellants gave evidence at the trial. They were content to rest on the submission of no case by their counsel.

Their Lordships do not consider it necessary in the present case to express any opinion as to whether it is essential in order to establish a breach of section 436 of the Criminal Code of Nigeria to prove that the accused person has been duly appointed

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and is properly qualified to act as a director, or whether it is sufficient—as contended by counsel for the Crown—to show that he has been acting in that capacity, since they are of opinion that, assuming proof of due appointment is required, there was abundant evidence in the present case from which the court could draw the inference that the appellants had been duly appointed directors of the Standard Bank of Nigeria Ld.

For these reasons their Lordships have humbly advised Her Majesty that these appeals should be dismissed.

Solicitors: *Rexworthy, Bonser & Wadkin; Charles Russell & Co.*

[HOUSE OF LORDS.]

H. L. (E.)*
1955
July 19, 20, 21;
Nov. 7.

SHARKEY (INSPECTOR OF TAXES) . . . . APPELLANT;
AND
WERNHER . . . . RESPONDENT.

Revenue—Income tax—Stock in trade—Disposal for owner's own use—Stud farm—Trade under Schedule D—Racing stables—Recreational and not taxable—Transfer of horses from farm to stables—Value attributable in stud farm accounts—Income Tax Act, 1918 (8 & 9 *Geo.* 5, *c.* 40), *Sch. D, Case I.*

Z. W. carried on a stud farm, an activity which was admittedly "husbandry" and taxable under Schedule D, and also, as a separate activity, racing stables, which gave rise to no liability to tax, being a "recreational" enterprise. Horses were bred at the stud farm for the racing stables. On the transfer of five horses in the relevant year of assessment from the stud to the stables:—

Held (Lord Oaksey dissenting), that where a person carrying on a trade disposes of part of his stock in trade not by way of sale in the course of trade but for his own use, enjoyment, or recreation, he must bring into his trading account for income tax purposes the market value of that stock in trade at the time of such disposition, and that, accordingly, the amount to be credited to the stud farm accounts on the transfer of the horses was their market value and not the cost of breeding them.

Watson Brothers v. *Hornby* (1942) 168 L.T. 109; [1942] 2 All E.R. 506; 24 T.C. 506 approved.

Laycock v. *Freeman, Hardy & Willis Ltd.* [1939] 2 K.B. 1; 55 T.L.R. 218; [1938] 4 All E.R. 609, and *Briton Ferry Steel Co. Ltd.*

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* *Present*: VISCOUNT SIMONDS, LORD PORTER, LORD OAKSEY, LORD RADCLIFFE and LORD TUCKER.

v. *Barry* [1940] 1 K.B. 463; 56 T.L.R. 248; [1939] 4 All E.R. 541 considered.

Decision of the Court of Appeal [1954] Ch. 713; [1954] 2 All E.R. 753 reversed.

APPEAL from the Court of Appeal (Evershed M.R., Jenkins and Hodson L.JJ.).

This was an appeal from an order of the Court of Appeal dated July 7, 1954, allowing an appeal by the respondent, Sir Harold Wernher, from an order of the Chancery Division (Vaisey J.) dated July 24, 1953, whereby an appeal by the respondent from a determination of the Commissioners for the Special Purposes of the Income Tax Acts on a case stated by them was allowed and their determination was reversed. The appellant was Oswald Thomas Bernard Sharkey, Inspector of Taxes.

The facts were set out in the case stated as follows:—

"(1) At a meeting of the Commissioners for the Special "Purposes of the Income Tax held on June 19, 1951, Sir Harold "Wernher (hereinafter called 'the respondent') appealed against "an assessment to income tax in the estimated sum of £5,000 "for the year 1949–50 under Case I of Schedule D made upon "him in respect of the profits of his wife, Lady Zia Wernher "(hereinafter referred to as 'Lady Zia') arising to her from a "stud farm. . . .

"(2) Lady Zia carries on the activities of a stud farm. . . . "It is common ground between the parties that these activities "constitute 'farming' which, by virtue of section 10 of the "Finance Act, 1941, and section 31 (1) (*a*) of the Finance Act, "1948, is to be treated as the carrying on of a trade and the "profits whereof are to be charged to tax under Case I of "Schedule D. In addition she also carries on activities of racing "and training. It is common ground between the parties that "these activities are not 'farming' or 'trading' but are purely "'recreational' activities. At her stud farm Lady Zia breeds "horses for her racing stables and from time to time transfers "horses from her stud farm to her stables. In the year ended "December 31, 1948 (being the basic year for the year of "assessment 1949–50) she transferred five horses from her stud "farm to her stables. The cost of breeding these horses had "been debited in the stud farm accounts, and it was common "ground between the parties that, consequent upon such transfer, "for income tax purposes, some figure in respect of the trans-"ferred horses fell to be brought into the stud farm accounts as "a receipt. The market value of these horses (if they had been "sold) was considerably in excess of their cost, and the sole "ground of appeal against the assessment put forward on behalf "of the respondent was that the figure proper to be brought into "the accounts as aforesaid was the cost of the transferred horses "and not (as contended on behalf of the appellant) the market "value on an assumed scale.

"(3) At her stud farms Lady Zia keeps stallions, and, in "addition to breeding horses for herself, she allows mares of "other people to be brought to her stud farms and to be served "by her stallions. For these services she charges the owners "fees. . . ."

like [illegible]

There was evidence that Lady Zia bred to sell as well as to race.

Sir Reginald Manningham-Buller Q.C., A.-G., R. E. Borneman Q.C. and *Sir Reginald Hills* for the appellant. The profit of the business of the stud farm was estimated on the right principle for the purpose of assessment to income tax. In *Watson Brothers* v. *Hornby*[1] the facts were indistinguishable from those of the present case. The decision that market value was the correct amount to credit was right and should be followed in the present case. Ever since it was decided it has been treated by the Revenue as providing the right basis of assessment. What Macnaghten J. in that case called "reasonable price" is the same thing as "market value."

Briton Ferry Steel Co. Ltd. v. *Barry*[2] had nothing to do with a problem of this nature. It was a case of succession to a trade and the real issue was what the basis period should be. In so far as any part of the reasoning of Lord Greene M.R. was to the effect that cost price and not market price was the proper credit item in a trading account in circumstances similar to those of the present case, it was on a point not then in issue. Alternatively, it was not well founded. Similarly the reasoning and decision in *Laycock* v. *Freeman, Hardy & Willis Ltd.*[3] was not material to the issue in the present appeal, since the problem was not debated and was not in issue. In those cases the Court of Appeal was concerned with the question whether a person had succeeded for income tax purposes to a trade previously carried on by someone else and with the consequent determination of the period the profits of which were to be the basis for the tax. It did not decide any question as to the method by which the profits of any such period, when determined, should be computed. In *Inland Revenue Commissioners* v. *William Ransom & Son Ltd.*[4] there was an artificial dichotomy and there was no dispute that, when the debiting took place, market value was the proper basis of the calculation.

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[1] (1942) 168 L.T. 109; [1942] 2 All E.R. 506; 24 T.C. 506.

[2] [1940] 1 K.B. 463; 56 T.L.R. 248; [1939] 4 All E.R. 541.

[3] [1939] 2 K.B. 1; 55 T.L.R. 218; [1938] 4 All E.R. 609.

Once it is conceded that Lady Zia was carrying on a trading business and that part of the stock in trade has been disposed of, then it is to be inferred that it has been disposed of in the course of trade, and it must therefore be taken that it was disposed of at market value. The respondent is liable to pay income tax on that figure under section 10 of the Finance Act, 1941.

If an artist kept a painting which he might sell for £10,000 to decorate his own house, it might be that he should be charged nothing at all, but if he were charged the cost of production would be the wrong basis.

It always comes back to this: On what basis must the notional figure (for it must be notional) be determined—the market value or the cost of production? The purpose is to enable the balance of profits and gains to be arrived at. If one takes the basis of market value the result is more in accordance with reality than otherwise would be the case. In relation to taxation the line must be drawn when the horses are withdrawn from the stud farm, the taxable activity. On that basis the only way in which one can get anything like an accurate result is to take the market value figure.

Borneman Q.C. following. The Crown is concerned only with the point of principle. One is presupposing an imaginary sale. For that purpose there is no more difficulty in arriving at the value of the horses on proper evidence than in valuing any other objects. In this case the Master of the Rolls accepted that the Crown's contention was commercially reasonable and only rejected it because of his reading of *Laycock* v. *Freeman, Hardy & Willis Ltd.*[5] and *Briton Ferry Steel Co. Ltd.* v. *Barry.*[6] In the former case the court was only concerned with the basis period. In the latter case the issue was nothing like the present issue as appears from the argument.[7] Greene M.R.,[8] it is true, in his observations as to an imaginary sale price, appealed to reality, but there is no reality in the matter. The cost price is just as notional as the sale price. It was artificial quoad that particular company. We

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[4] [1918] 2 K.B. 709; 34 T.L.R. 533.

[5] [1939] 2 K.B. 1.

[6] [1940] 1 K.B. 463.

[7] Ibid. 471, 473.

[8] Ibid. 484.

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are in a field of notionalism and one figure has no more reality than another. In this context there is no commercial reality about crediting cost price.

In *Inland Revenue Commissioners* v. *William Ransom & Son Ltd.*[9] the judge fully appreciated that the market price was being adopted. It was accepted as the proper basis without question by him and by both sides.

One must apply the ordinary principles of commercial accounting and on them the cost incurred cannot be the proper credit. It is wrong to talk of these horses as having been withdrawn from the trade. They were produced in the course of trade and disposed of by Lady Zia.

The principle enunciated by Palles C.B. in *Dublin Corporation* v. *M'Adam*[10] that a man cannot trade with himself is unexceptionable, but the legislature has made inevitable some invasion of it and it does not apply in this context. Even if "profits and "gains" mean actual commercial profits in Schedule D, the Finance Act, 1941, by section 10, which transferred farming and market gardening from Schedule B to Schedule D, changed the meaning of the expression, so that a farmer is taxable on the market value of produce which he himself consumes. This case could not have arisen before the Act. Since then farming must be treated as a trade for income tax purposes and its profits and gains must be charged under Case I of Schedule D. So when the owner takes over or gives away what was trading stock, at the moment of disposal it must be treated as if sold in the course of trade and therefore a receipt equivalent to market value must be credited.

The principle in *Dublin Corporation* v. *M'Adam*[10] does not apply where a person deals with himself in two capacities which are relevant for income tax purposes. There is here a split between Lady Zia's activities in stud farming and racing respectively so that she was dealing with herself in two different capacities. The Irish case is not an authority for only taking cost of production into account in such a case as this. The object and end of the calculation here is to discover the balance of profits and gains on Lady Zia's activities at the stud farm. There is an inevitable dichotomy in such a situation. See, for example, *Laycock* v. *Freeman, Hardy & Willis Ltd.*[11] With such a dichotomy in mind one must, on ordinary commercial and accounting principles, look at the cost of production and some reasonable percentage of profit over and above it. There is an analogy to such a calculation in rule 12 of the General Rules to the Income Tax Act, 1918. The value shows the profit. *Inland Revenue Commissioners* v. *William Ransom & Son Ltd.*[12] and *Watson Brothers* v. *Hornby*[13] were examples of the same sort of dichotomy as here. On the ordinary principles of commercial accountancy, in circumstances such as the present, where one is striking a balance of the profits or gains of activity A one must take the value and not the cost of production of articles disposed of to activity B. This accords with common sense and commercial reality. As regards Schedule D at least, the Income Tax Acts are commercial Acts. It is hard to find any distinction between taking a single article and taking a series of articles.

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[9] [1918] 2 K.B. 709, 712–3.

[10] (1887) 20 L.R.Ir. 497; 2 T.C. 387.

[11] [1939] 2 K.B. 1, 6.

[Reference was also made to *Wernher* v. *Inland Revenue Commissioners*,[14] *Gresham Life Assurance Society* v. *Styles*[15] and *Hughes* v. *Bank of New Zealand*.[16]]

L. C. Graham-Dixon Q.C. and *Peter Rowland* for the respondent. "The profits or gains arising or accruing from any trade" on which paragraph 1 of Schedule D to the Income Tax Act, 1918, imposes tax are the actual profits in fact arising from the trade. The horses which Lady Zia moved from her stud farm to her training establishment were not sold or disposed of by her in the way of trade in the course of carrying on the stud farm or at all and no profit arose or accrued to her by reason of that removal.

The main purpose of the stud farm was to produce horses for Lady Zia's racing stables. The Crown's argument ignores the facts of the case and this purpose and computes profits on a mere hypothesis. Lady Zia is not taxable under Case I of Schedule D [illegible] because she is running this stud farm to ~~supply~~ serve herself with horses. She has been assessed in spite of that fact because she sells some horses and receives some fees for stud services to outsiders.

It is not permissible to write in the highest figure which could have been obtained for the transferred horses in the open market. One must not impute to the taxpayer profits which he might have made but has not in fact made. That is a matter of general principle: see *Laycock* v. *Freeman, Hardy & Willis Ltd.*[17] and

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[12] [1918] 2 K.B. 709.

[13] 168 L.T. 109.

[14] [1942] 1 K.B. 399.

[15] [1892] A.C. 309; 8 T.L.R. 618.

[16] [1937] 1 K.B. 419, 462; 53 T.L.R. 258; [1936] 3 All E.R. 925; (H.L.) [1938] A.C. 366; 54 T.L.R. 542; [1938] 1 All E.R. 778.

[17] [1939] 2 K.B. 1.

Briton Ferry Steel Co. Ltd. v. *Barry.*[18] There must be two parties if there is to be a sale, and until goods are sold no profit arises. One does not make or earn profits merely by producing an article. It is not until the stock in trade is actually disposed of that a profit is made. If a man eats grapes which he has grown himself he does not make a profit. He is not to be taken to have been dealing with himself in another capacity and eating his grapes at the full market value. These horses were withdrawn from the stud farm just as a farmer may withdraw a hundred geese from his farm at Christmas to give away as presents. No income tax significance can be attached to a trader taking stock out of his trade for his personal use. Land may have a mixed use, partly to make a profit and partly to produce things for one's own enjoyment. Mere benefits are not to be taxed as "profits or gains": *Gresham Life Assurance Society* v. *Styles.*[19] A man cannot trade with himself or make a profit out of himself in any circumstances: *Dublin Corporation* v. *M'Adam*[20] and *Carlisle and Silloth Golf Club* v. *Smith.*[21] This is universally true and solves the present problem.

Stock in trade in hand at the end of the year is brought into account as a debit on the sales side because it has not been sold in the course of trade. In these accounts a sum equal to the cost of production of the horses is to be credited as the equivalent of expenditure which in the event turned out not to have been for the purpose of trade, as they were not disposed of in the way of trade. The figure entered is only a cancellation of that cost, since, the horses having been withdrawn from the trade, there must be written out of the accounts the whole cost bona fide, though mistakenly, entered in respect of them. The cost to the trade, however computed, must appear in the accounts. It is therefore wrong to impute to Lady Zia a non-existent profit.

National Association of Local Government Officers v. *Watkins*[22] illustrates the fundamental proposition that only the actual profits of a trade are to be taxed. To the extent that a trader takes stock out of the trade he is making a decision not to trade in it and so not to make a profit out of it. Therefore a method of accounting is used for taking it out of the trading accounts.

Watson Brothers v. *Hornby*[23] was wrongly decided for the reasons set out by the Crown in the case stated. The decision was based on an artificial and inadmissible loss.

[18] [1940] 1 K.B. 463.

[19] [1892] A.C. 309; 8 T.L.R. 618.

[20] 20 L.R.Ir. 497; 2 T.C. 387.

[21] [1913] 3 K.B. 75; 29 T.L.R. 508.

[22] (1934) 18 T.C. 499.

[23] 24 T.C. 506, 508.

If one breeds a foal for three years one debits the cost each year. If in the fourth year one withdraws it from the trade of horse breeding and rides it oneself, one can no longer debit the cost to the business. If one transfers stock from one activity to another one should treat the exit price from activity A as the entering price to activity B.

It is universal that a man cannot make a profit out of himself. On the authority of *Watson Brothers* v. *Hornby*[24] the Acts compel one to take the course submitted by the Crown where there are two taxable activities. But that case was wrongly decided and, in any event, did not go so far as to affect the withdrawal of an asset to a recreational activity. Accordingly, even if it was rightly decided it does not affect this case.

If no horses had been sold or stud services rendered to outsiders there would have been no "husbandry" made taxable under Schedule D by section 10 of the Finance Act, 1941.

[Section 26 of the Finance Act, 1938, was also referred to.]

Sir Reginald Manningham-Buller Q.C., A.-G. in reply. This problem only arose since farming was to be assessed under Case I of Schedule D instead of under Schedule B by virtue of section 10 (1) of the Finance Act, 1941. Farming must now be dealt with as a trade, even if one would not so consider it apart from statutory provision. Even if the stud had been kept solely for the purposes of Lady Zia's racing, the activity would still have been "farming" within that subsection and taxable accordingly. The definition of "husbandry" in dictionaries such as Murray's and Webster's are unrelated to the question whether there have been sales of produce. In this it is different from market gardening under section 10. This activity must be treated as a trade even though it was not carried on commercially but was run exclusively for the production of foals for Lady Zia's racing. To say otherwise is to try to get away from what is set out as common ground in paragraph 2 of the case stated. It follows that one must make the artificial dichotomy referred to by Vaisey J. and required by law. Artificiality arises because of section 10 of the Act of 1941.

To put the market value of the horses into the trading account rather than the cost of production enables one to get a more real picture of the transaction. The respondent's case is contrary to commercial principles and realities and leads to a conclusion which is wholly unrealistic. What happens to any article after it has left the particular taxable activity is irrelevant. It is hard to find a principle which applies to every case. The present case is a long way from one where the trader made neither a profit nor a loss, for Lady Zia took assets out of the business. Her stud account was debited with the cost of rearing the foals and after transfer she credited it with the same figure. The question whether, if the Crown is not right in requiring the market value to be inserted, it could require cost of production to be brought in is not important in this case.

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[24] 168 L.T. 109.

Watson Brothers v. *Hornby*[24] was rightly decided. The Crown also pray in aid section 26 of the Finance Act, 1938, in relation to which it can be said that there was no sale. See also *Glenboig Union Fireclay Co.* v. *Inland Revenue.*[25]

Their Lordships took time for consideration.

November 7. VISCOUNT SIMONDS. My Lords, this appeal arises upon an assessment to income tax for the year 1949–50 made upon the respondent, Sir Harold Wernher, in respect of profits made by his wife, Lady Zia Wernher, from a stud farm owned and carried on by her. The question in dispute is what amount should be entered on the credit side of the trading account of the stud farm in respect of animals bred there and transferred to a racing establishment also carried on by her.

It is common ground between the parties that some amount must be credited in respect of these animals upon their transfer (a matter upon which I shall say something later) and the issue has been whether this amount should be the cost of production of the animals so transferred or their market value at the date of transfer.

The course of proceedings before the matter reached your Lordships' House has been as follows: An estimated assessment in an amount of £5,000 was made upon the respondent for the year 1949–50 in respect of the profits arising from the stud farm. He appealed from this assessment to the Special Commissioners, the only material ground of appeal being that which I have already indicated, that in principle the assessment was based on crediting the trading account of the stud farm with the market value of the transferred animals, instead of with the cost of their production. The Special Commissioners allowed his appeal, and at the request of the present appellant stated a case for the opinion of the High Court. The case duly came before Vaisey J., and on July 24, 1953, that learned judge gave judgment allowing the appeal. In his opinion the case was indistinguishable in principle from *Watson Brothers* v. *Hornby*,[1] and he was bound by it. I shall have to consider this case in some detail presently. The respondent appealed to the Court of Appeal, which unanimously reversed the judgment of Vaisey J., being, I think, largely influenced to that course by a previous decision of the Court of Appeal in *Briton Ferry Steel Co. Ltd.* v. *Barry*.[2] The question at issue has therefore so far been resolved by saying that in principle the stud farm trading account must be credited only with the cost of production of the transferred animals. The question of figures is still at large. The Crown now appeals and contends that it is the market value of the transferred animals, not the cost of their production, with which the account must be credited.

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[24] 168 L.T. 109.

[25] 1922 S.C. 112; 12 T.C. 427.

Before I examine the rival contentions, and the authorities by which they are supported, I must make certain further observations which are not, I think, controversial.

It is not in dispute that the enterprise of a stud farm carried on by Lady Zia Wernher is what has been called a taxable activity, which is another way of saying that the respondent is chargeable in respect of any profits arising therefrom in accordance with the Rules of Case I of Schedule D of the Income Tax Act, 1918, relating to trades. Nor is it in dispute that the racing establishment carried on by Lady Zia is not a taxable activity: her profits, if any, of that activity are not subject to taxation; her losses, if any, cannot be set off against any other taxable income. This has been called a recreational activity.

Further, it is common ground that the stud farm enterprise is a farming enterprise which is by virtue of section 10 of the Finance Act, 1941, and section 31 (1) (*a*) of the Finance Act, 1948, to be treated as the carrying on of a trade, and, accordingly, that its profits are chargeable in the way that I have mentioned.

Again, it is not disputed that (to take the year ending December 31, 1948, as an example) Lady Zia transferred five horses from her stud farm to her racing establishment and that their then market value exceeded their cost of production. Nor, I think, is it in doubt that a main purpose, if not the main purpose, of the stud farm was to supply the racing establishment.

These, my Lords, are the simple facts of the case, and it is perhaps surprising that in the year 1955 there should be any room for doubt about a position which cannot in its essentials differ from a great many other cases. I wish at the outset to say that I attach no importance to the fact that of Lady Zia's two activities to which I have referred the one is taxable and the other is not. I do not understand how her taxable profits in respect of the stud farm can in principle be the greater or the less because the profits of the racing establishment are or are not taxable. The problem, therefore, in all its simplicity, is whether a person, carrying on the trade of farming or, I suppose, any other trade, who disposes of part of his stock in trade not by way of sale in the course of trade but for his own use, enjoyment, or recreation, must bring into his trading account for income tax purposes the market value of that stock in trade at the time of such disposition. But for the fact that this case has throughout proceeded upon the footing as stated in paragraph 2 of the special case that "some figure "in respect of the transferred horses fell to be brought into the "stud farm accounts as a receipt," I should have stated the problem differently. I say this because, since it is the respondent's case that Lady Zia did not dispose of the transferred horses in the way of trade, I do not understand why it is admitted that she should be credited as a receipt with the cost of production. In fact as a trader she received no more the cost of production than the market value: I do not understand, therefore, why the argument did not proceed that, as she received nothing, her trading account should be credited with nothing; that she suffered, so far as her trade was concerned, a dead loss in respect of these animals, and that the accounts of the stud farm should be made up so as to show this like any other dead loss. I do not understand how the adjustment could take the form of the fictitious entry of a receipt which had not been received.

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[1] (1942) 168 L.T. 109; [1942] 2 All E.R. 506.

[2] [1940] 1 K.B. 463; 56 T.L.R. 248; [1939] 4 All E.R. 541.

My Lords, I am the more puzzled by the basis on which this case has proceeded because learned counsel for the respondent has throughout insisted on what is an elementary principle of income tax law that a man cannot be taxed on profits that he might have, but has not, made: see, e.g., *Dublin Corporation* v. *M'Adam*[3]; *Gresham Life Assurance Society* v. *Styles*.[4] But this is only saying in another way that a trader is not to be charged with the receipt of sums that he might have, but has not, received, and this is equally true whether the sum with which it is sought to charge him is market value or production cost, whether it will result in a notional profit or a notional balancing

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[3] (1887) 20 L.R.Ir. 497; 2 T.C. 387.

[4] [1892] A.C. 309; 8 T.L.R. 618.

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of receipts with expenditure and whether the reason for his not in fact receiving such a sum is that the goods which are his stock in trade have perished in the course of nature or that he has chosen to use them for his own pleasure or otherwise dispose of them. The true proposition is not that a man cannot make a profit out of himself but that he cannot trade with himself. The question is whether and how far this general proposition must be qualified for the purposes of income tax law.

An attempt has been made to justify the notional receipt of a sum equal to the cost of production by treating such a receipt as the equivalent of an expenditure which in the event proved not to have been for the purpose of trade, since the article was not disposed of in the way of trade. But this is pure fiction. Up to the very moment of disposition (in this case the transfer of a horse from stud farm to racing stable) the article was part of the trader's stock in trade and the cost of its production was properly treated as part of his expenditure for income tax purposes. I see no justification for an ex post facto adjustment of account which in effect adds to a fictional receipt a false attribution of expenditure.

This is, however, the position with which we are faced. Your Lordships may not think it necessary to express any opinion on the question whether, if the Crown is not right in requiring market value to be brought into account in the present case, it is nevertheless entitled to require the cost of production to be brought in. This is said to be of no importance in this case, though it might well be of great importance in other cases. Yet I cannot refrain from calling attention to what must be fundamental to the solution of the question. For I cannot escape from the obvious fact that it must be determined whether and why a trader, who elects to throw his stock in trade into the sea or dispose of it in any other way than by way of sale in the course of trade, is chargeable with any notional receipt in respect of it, before it is asked with how much he should be charged.

It is, as I have said, a surprising thing that this question should remain in doubt. For unless, indeed, farming is a trade which in this respect differs from other trades, the same problem arises whether the owner of a stud farm diverts the produce of his farm to his own enjoyment or a diamond merchant, neglecting profitable sales, uses his choicest jewels for the adornment of his wife, or a caterer provides lavish entertainment for a daughter's wedding breakfast. Are the horses, the jewels, the cakes and ale to be treated for the purpose of income tax as disposed of for nothing or for their market value or for the cost of their production?

It is convenient at this stage to refer to the case of *Watson Brothers* v. *Hornby*,[5] which I have already mentioned. In that case the taxpayers, who were the appellants in the appeal, carried on a business of poultry dealers and breeders of poultry at a hatchery belonging to them which was conceded to be an enterprise chargeable as a trade under Case I of Schedule D of the Income Tax Act, 1918. The business of the hatchery was to produce and sell day-old chicks. They also carried on farming activities which were conceded to be, for income tax purposes, a separate enterprise from the hatchery business and, as the law then stood, were an income tax source chargeable under Schedule B of the Income Tax Act, 1918. Most of the produce of the hatchery was sold, but a substantial number of day-old chicks were from time to time transferred to the farm and became part of the stock of poultry of the farm. The question in the appeal was whether, in computing the profits of the hatchery business, the day-old chicks transferred to the farm should be brought in at cost or market value. The market value was at the material times much below cost, viz., 4d. as against 7d. per chick. It was contended for the taxpayers that market price and for the Crown that cost of production should be adopted as the appropriate figure in the accounts. It was decided by Macnaghten J. that the taxpayers' contention was right, and they were accordingly chargeable upon the footing that as traders in respect of their hatchery business they received 4d. only per chick. This decision, which your Lordships were told has ever since been adopted as the basis of assessment by the Revenue in similar cases, involves two things, first, that (i) the taxpayer may in certain cases be subject to a sort of dichotomy for income tax purposes and be regarded as selling to himself in one capacity what he has produced in another, and, secondly, (ii) that he is regarded as selling what he sells at market price. It is a decision upon which the appellant relies in the present case, and which, as I have said, Vaisey J. regarded as an authority binding him. The learned judge also derived some assistance from *Inland Revenue Commissioners* v. *William Ransom & Son Ltd.*,[6] in which it was at least recognized that for tax purposes two parts of an enterprise carried on by a taxpayer should be treated as distinct. But it was not, I think, an issue in that case at what price goods should be deemed to be transferred from one part of the enterprise to the other.

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[5] 168 L.T. 109.

[6] [1918] 2 K.B. 709; 34 T.L.R. 533.

In the Court of Appeal two cases were relied on which appear not to have been cited to Macnaghten J. in *Watson Brothers* v. *Hornby*.[7] They were *Laycock* v. *Freeman, Hardy & Willis Ltd.*[8] and *Briton Ferry Steel Co. Ltd.* v. *Barry*.[9] The value of these cases lies less in their direct bearing upon the present case than in the observations of the late Lord Greene, which must always have great weight with any court. In the former case the primary question was whether there had been a succession for the purpose of rule 11 (2) as enacted in section 32 of the Finance Act, 1926, of Cases I and II of Schedule D of the Income Tax Act, 1918, and, though the decision contains a valuable exposition of the general principle that income tax is payable upon profits that are actual, not imaginary, the court in fact held that there had been no "succession" and the question of the price of transfer of goods from predecessor to successor did not arise. In the *Briton Ferry* case,[9] on the other hand, the court held that there was a "succession" for the purpose of the relevant rule and, though the Attorney-General was, I think, right in saying that in that case the real issue was what the basis period should be rather than how the profits of that period when ascertained should be computed, once again the observations of Lord Greene justified the Court of Appeal in the present case in thinking that they ought to regard the cost price rather than the market value of transferred commodities as affording the correct method of computation.

I do not think that there is any other authority to which I can usefully call your Lordships' attention, and it appears to emerge from the cases that I have cited that Vaisey J. was amply justified in saying that, if any of them was correctly decided, the legislature had made inevitable some invasion of the principle that the taxpayer cannot make a profit by selling to himself. For I repeat that I see no valid distinction between a trader crediting himself with a price (market value) which produces a profit or with a price (production cost) which strikes a balance or reduces his loss. Yet it is the basis equally of the judgment of Macnaghten J. in *Watson Brothers* v. *Hornby*[10] and of the observations of Lord Greene in the *Laycock*[11] and the *Briton*

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[7] 168 L.T. 109.

[8] [1939] 2 K.B. 1; 55 T.L.R. 218; [1938] 4 All E.R. 609.

[9] [1940] 1 K.B. 463.

[10] 168 L.T. 109.

[11] [1939] 2 K.B. 1.

Ferry[12] cases that something has to be brought into account where the legislature recognizes a sort of artificial dichotomy and a taxpayer is regarded as carrying on more than one taxable activity. And so also, as I have more than once pointed out, in this case it is conceded by the taxpayer that some figure must appear in the stud farm account as a receipt in respect of the transferred horses, though Lady Zia in her capacity as transferee did not carry on a taxable activity. In the same way, it would, I suppose, be claimed that, if Lady Zia were to transfer or re-transfer a horse from her racing establishment to her stud farm, some figure would have to appear in the stud farm accounts in respect of that horse, though it cost her nothing to make the transfer: if it were not so and she subsequently sold the transferred horse and the proceeds of sale were treated as receipts of the stud farm, she could justly complain that she had been charged with a fictitious profit.

My Lords, how far is this principle, which is implicit in the judgments that I have cited and in the admission upon which this case has proceeded, supportable in law? That it conflicts with the proposition taken in its broadest sense, that a man cannot trade with himself is, I think, obvious. Yet it seems to me that it is a necessary qualification of the broad proposition. For, if there are commodities which are the subject of a man's trade but may also be the subject of his use and enjoyment, I do not know how his account as a trader can properly be made up so as to ascertain his annual profits and gains unless his trading account is credited with a receipt in respect of those goods which he has diverted to his own use and enjoyment. I think, therefore, that the admission was rightly made that some sum must be brought into the stud farm account as a receipt though nothing was received and so far at least the taxpayer must be regarded as having traded with himself. But still the question remains, what is that sum to be? I suppose that in the generality of cases in which the question arises in a farming or any other business, e.g., where the farmer supplies his own house with milk, or a market gardener with vegetables, an arbitrary or conventional sum is agreed. The House was not given any information as to the prevailing practice. Now the question precisely arises. In answering it I am not influenced by the fact that a change in the law has made the farmer liable to tax under Schedule D instead of under Schedule B, nor does section 10 of the Finance Act, 1941, affect my mind beyond the fact that it emphasizes the artificial dichotomy which the scheme of income tax law in many instances imposes. But it appears to me that, when it has been admitted or determined that an article forms part of the stock in trade of the trader and that upon his parting with it so that it no longer forms part of his stock in trade some sum must appear in his trading account as having been received in respect of it, the only logical way to treat it is to regard it as having been disposed of by way of trade. If so, I see no reason for ascribing to it any other sum than that which he would normally have received for it in the due course of trade, that is to say, the market value. As I have already indicated, there seems to me to be no justification for the only alternative that has been suggested, namely, the cost of production. The unreality of this alternative would be plain to the taxpayer, if, as well might happen, a very large service fee had been paid so that the cost of production was high and the market value did not equal it.

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[12] [1940] 1 K.B. 463.

In my opinion, therefore, the judgment of the Court of Appeal was wrong and should be reversed, and the judgment of Vaisey J. restored.

LORD PORTER. My Lords, I have had an opportunity of reading the opinion of my noble and learned friend, Viscount Simonds, and the opinion about to be delivered by my noble and learned friend, Lord Radcliffe, and I agree with them both.

LORD OAKSEY. My Lords, the question in this case is whether a farmer or market gardener is liable, under section 10 of the Finance Act, 1941, to pay income tax under Schedule D, Case I, on the market values of goods which he does not sell but takes or uses for his own purposes.

The respondent's wife, Lady Zia Wernher, owns two studs of horses at which she breeds racehorses, some of which she sells and some of which she puts into training. It is common ground that stud farms are trades for the purposes of income tax and that a racing stable is not. The Inland Revenue contend that the respondent is liable under section 10 of the Act of 1941 for income tax on the market value of the horses his wife puts into training as well as on the prices she obtains for the horses she sells.

The words of section 10 of the Act of 1941 are, so far as material, as follows: "(1) Subject, as respects farming and

" farm land, to the provisions of the next succeeding section, " farming and market gardening shall be treated as trades for " the purposes of income tax and accordingly—(*a*) the profits " or gains thereof shall be charged under Case I of Schedule D; " and (*b*) income tax shall not be charged under Schedule B in " respect of the occupation of any farm land or market garden " land: . . . (2) For the purposes of this and the next succeeding " section the following expressions have the meanings hereby " respectively assigned to them, that is to say,—' market garden " ' land ' means land occupied as a nursery or garden for the " sale of the produce (other than land used for the growth of " hops) and ' market gardening ' shall be construed accordingly; " ' farm land ' means land wholly or mainly occupied for the " purposes of husbandry, not being market garden land, and " includes the farm house and farm buildings, if any, and " ' farming ' shall be construed accordingly; . . ."

In my opinion, the Court of Appeal and the commissioners were right in holding that the respondent is not liable. His wife has not, in my opinion, made a profit or gain on the horses in question within the meaning of section 10 of the Act of 1941.

I think this follows from two principles which have long been established on the construction of the Income Tax Acts. The first principle is that the " profits or gains " taxed are actual commercial profits and not mere benefits (see *Tennant* v. *Smith*[13] and *Gresham Life Assurance Society* v. *Styles*[14]). The second is that a man cannot trade with himself in the sense in which the word " trade " is used in the Income Tax Acts. As Palles C.B. said in *Dublin Corporation* v. *M'Adam*[15]: " On " the other hand, I think it is perfectly clear that, in order to " bring this case within the operation of the Income Tax Act, " it is necessary that there shall be this trading in its strict " true sense. There must be, at least, two parties—one supplying water, and the other to whom it should be supplied and " who should pay for it. If these two parties are identical, in " my opinion there can be no trading. No man, in my opinion, " can trade with himself; he cannot, in my opinion, make, in " what is its true sense or meaning, taxable profit by dealing " with himself; and in every case of this description it appears " to be a question on the construction of the Act whether the " two bodies—the body that supplies and the body or class that

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[13] [1892] A.C. 150; 8 T.L.R. 434.

[14] [1892] A.C. 309.

[15] 20 L.R.Ir. 497, 510; 2 T.C. 387, 397.

"has to pay—were either identical, or, upon the true construction of the Act, must be admitted to have been held by the "Legislature to be identical, and so legislated for upon that "basis."

In my opinion Palles C.B. was right and no authority inconsistent with his view was cited to your Lordships. The idea of a person trading with himself is inconsistent with the idea of ownership. An owner can do as he likes with his own property apart from legislation: he cannot be compelled to sell his own property to himself either at the market or any other value apart from legislation to that effect. Any sale so called which a trader makes to himself must be "notional" and not "actual." He cannot make a commercial profit or loss by transferring an asset from himself to himself or by a gift to someone else no matter what price he notionally ascribes to the transaction.

It may be said that such things rarely happen, and that the maxim de minimis is applicable, but it is impossible to answer the difficulty in that way because a trader's assets may be of great value, e.g., a diamond tiara or, for that matter, a thoroughbred two-year-old. It follows from this that an owner in trade can withdraw any asset he chooses from his trade for his own use provided, of course, that he does so bona fide and not with the intention of selling it outside his trade to someone else.

But then it is argued that, even if Palles C.B. was right that a trader cannot trade with himself and the words "profits "or gains" have the meaning of actual commercial profits in Schedule D, section 10 of the Finance Act, 1941, by transferring the trades of farming and market gardening to Schedule D has altered the meaning of the words "profits or gains" in such a way that a farmer is taxable upon the market value of the produce he uses for his own consumption. It is clear, however, from the definition of "market gardening" that this is not the rule in reference to that trade, but it is said that husbandry is different and that the dictionary definition of "husbandry" has no reference to sale of the produce of the land.

In my opinion, the meaning of the words "profits or gains" in section 10 (1) (*e*) of the Act of 1941 must be the same as their meaning in Schedule D. It cannot be that by such words as those of section 10 of the Act of 1941 the legislature intended to introduce a new principle with reference to the profits or gains of farming and market gardening, that is to say, to tax the profits or gains of farming and market gardening on one principle under Schedule D and all other trades on another principle under the same Schedule.

The argument of the Crown was also supported on the ground that Lady Zia Wernher's stud account, which had been debited with the cost of rearing the yearlings which she subsequently transferred to her racing stable, was then credited with the same figure.

In my opinion, there is no substance in this argument. Traders must show in their trading accounts the value of their assets. If they sell those assets they must credit the price obtained. If they do not sell them but get rid of them, either by using them themselves or in any other way, they must credit the figure at which the assets stand in their accounts or the profits of the account will be improperly diminished by the amount entered in the account as the value of the asset. Taxation under Schedule D is imposed on the balance of profits and gains. Profits and gains are actual commercial profits and gains, and similarly the deductions allowed by the Act which produce the balance are deductions which are considered to be properly attributable to the profits as being commercial expenses incurred in order to earn the profits. It follows, in my opinion, that such expenses as have been incurred to produce an asset which is withdrawn from the trade cannot properly be deducted and must therefore be withdrawn from the account, which can only be done in accordance with accounting practice by crediting the amount of the expenses.

For these reasons I am of opinion that the findings of the commissioners and the judgment of the Court of Appeal were right.

LORD RADCLIFFE. My Lords, this is a short, but very difficult, point. I believe that the most convenient way of expressing an opinion is to discuss in order some of the lines of argument that seem to have been most dwelt upon during the course of the case.

First, there is the point that the respondent's wife carries on a stud farm and the activities of the stud farm constitute "farming" within the meaning of section 10 of the Finance Act, 1941. This much is common ground and it is given to us by paragraph 2 of the case stated. It is worth observing that what is common ground is that the activities themselves constitute farming, not that only such of them constitute farming as can be seen ex post facto to have been devoted to the production and rearing of foals subsequently sold or to the obtaining of stallion fees. What follows, according to the appellant, is all quite simple. The Act has declared that farming is to be treated as a trade for the purposes of income tax and its profits or gains charged under Case I of Schedule D: therefore stock taken over by the owner or given away which was trading stock at the moment of disposal must be treated as if sold in the course of trade and a receipt equivalent to its market value entered accordingly. Such an entry, it is said, is required by the principles of ordinary commercial accountancy. Your Lordships need not pause on the figure of market value: the case states that the market value of the transferred horses was considerably in excess of their cost.

Now, I think that this line of argument offers the right introduction to the question, but it is too much of a simplification to say that it solves it. For the trader who supplies himself out of his stock in trade is a special case, by no means confined to the farmer, and we must not begin by assuming, without any evidence, that "ordinary commercial accounting" has any settled rule for such a case which would make it necessary to enter a receipt equivalent to market value in place of the stock disposed of. What we can say is that, prior to the Finance Act, 1941, the occupation of land for the purpose of husbandry was a source of income charged under Schedule B and, prima facie, the computation of the tax was based on an imputed profit taxed as income, whether the occupier consumed some, or even the whole, of the produce of the activity. The respondent's argument would lead to what would certainly be the odd result that the transfer to Case I of Schedule D effected in 1941 would give a complete exemption from tax to the occupier who supplies all his produce to himself. Moreover, it would be wrong to treat the question now before us as if it originated with the enactment of section 10 of the Finance Act, 1941. Rule 5 of the Schedule B rules in the Income Tax Act, 1918, allowed any person "occupying lands for the purposes of husbandry only" to elect to be assessed and charged under Schedule D instead of under this Schedule. What was the fate of the farmer who made such an election and then proceeded to show that all or some of his produce went to himself at cost or even, more logically, at no charge at all? Again, rule 6 gave an occupier a chance of satisfying his general commissioners that the profits from the occupation during the year fell short of the assessable value of the land under Schedule B and, if he did, the imputed income so assessed was reduced to the "actual amount" of the profit and any tax paid adjusted accordingly. What happened when an occupier came forward and showed little or no "actual" profit in the year because he had taken most of the produce at cost price?

I do not know the answers to these questions. But I think that they are relevant enough to make me feel rather suspicious of the respondent's tempting scheme of marking everything out to the owner at cost. On the other hand, I think that it throws too much weight on the bare enactment that farming is to be treated as a trade for income tax purposes to deduce from it that all disposals are to be assumed to have been made in the course of trading and that consequently a receipt must be entered equivalent to the market value of the stock disposed of. That may, indeed, be the right result: but, if there is any general principle of income tax law with which it conflicts, as the respondent says that there is, then I would not say that the mere wording of the statute stands in his way.

What, then, is the importance to this case of a general proposition such as that of Palles C.B.: "No man, in my "opinion, can trade with himself; he cannot, in my opinion, "make, in what is its true sense or meaning, taxable profit by "dealing with himself . . ." (*Dublin Corporation* v. *M'Adam* [15])? Later decisions have shown that this simple proposition may cover what are to be regarded as two separate questions, whether a man can trade or deal with himself and whether a man can make taxable profit by so doing (see, for instance, *Cornish Mutual Assurance Co. Ltd.* v. *Inland Revenue Commissioners* [16]). Having regard to the explanation of the decision in *New York Life Insurance Co.* v. *Styles*,[17] which is afforded by the last-mentioned case, I think that it must now be said that people can carry on trade or business with themselves, as by way of mutual insurance, but that, if they do, a resulting surplus from their operations is not a profit from a trade for the purposes of income tax, or, put another way, their operations do not for the same purposes constitute a trade from which a profit can result.

In my opinion, the composite proposition that a man cannot make taxable profit out of trading with himself is of unquestioned validity when it is applied to the two kinds of activity with which it is habitually associated in income tax history, mutual insurance and certain public utilities financed by rates. The one line of cases stems from *New York Life Insurance Co.* v. *Styles*,[17] the other from *Glasgow Corporation Water Commissioners* v. *Solicitor of Inland Revenue*.[18] Moreover, the proposition is a truism if it is merely resorted to to emphasize that no sale in the legal sense can take place between an individual as trader and the same individual as supplier: or that the taxable pocket from which the thing supplied comes is not likely to be refilled with money or money's worth from the taxable pocket into which the thing supplied goes. But, when we are asked to treat such a proposition as providing a universal solution that covers even the difficult problem which we are now faced with, it is necessary to remember that in the mutual-insurance and water-supply cases there was no question that the accounts of the operations did show a surplus; the question was whether the surplus shown constituted a profit within the meaning of the Income Tax Act. The situation presented to us is a different one. For we are required to assume, what those decisions in effect denied, that the activities to which the accounts relate do constitute a trade for income tax purposes; and our problem is to determine what upon that basis are the proper entries to make in those trading accounts in relation to certain transactions with trade stock. I doubt very much whether the result of those decisions could have been what it was if the income tax statute had declared that the operations in question were to be regarded as a trade and, as such, a source of taxable profit. So, all things considered, I do not think that we ought to treat the respondent's general proposition as precluding the possibility that the income tax scheme may be found to require that in certain situations a taxpayer should be treated as if he had dealt with himself on commercial terms.

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[15] 20 L.R.Ir. 497, 510.

[16] [1926] A.C. 281.

[17] (1889) 14 App.Cas. 381; 5 T.L.R. 621.

To begin with, I am not prepared to forget that the tax code already achieves this fictitious separation in various ways. The owner-occupier of business premises charges against his trade receipts the annual value of those premises for the purposes of his Case I, Schedule D assessment (Income Tax Act, 1918, rules applicable to Cases I and II of Schedule D, rule 5). No money passes, but he is treated as his own lessor. The non-resident producer or manufacturer who is liable to tax because he markets in the United Kingdom is entitled to have his assessment based on merchanting profit only (Income Tax Act,

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[17] (1889) 14 App.Cas. 381.

[18] (1875) 2 Rettie 708; 1 T.C. 28.

1918, General Rules, rule 12). For the purposes of assessment he is treated as if he, as producer or manufacturer, had sold to himself as merchant or retailer, and had made the sale on trade terms. The provisions which are contained in treaties for relief against double taxation habitually set up a system under which the profits made by the producer or manufacturer of one country but sold through a "permanent establishment" of his in another are divided between the two taxing jurisdictions on the basis of a similar fictitious division of the taxpayer's personality and a similar fictitious trading with himself.

My Lords, it may be objected that these situations are all provided for and regulated by statutory enactment, that these indeed are planned departures from what would otherwise be the general rule, and that it is just because there is no provision which deals with the present type of case that our decision should be for the respondent. I do not see great force in this. The statutory enactments have, of course, settled the matter wherever they operate by providing definite rules for their particular occasions: but what we are looking for is some principle to determine the respondent's assessability to taxation, and I think that it is a wrong sort of approach to look for principles in judicial decision only and to treat the whole income tax code as if it made law but could not itself contain principle. But, apart from that, it seems to me that we are dealing with a problem that must have arisen in hundreds of thousands of cases under various forms, and I think that there are traces that the courts have not found this general proposition that a man cannot trade with himself or make profit out of himself a satisfactory guide for all purposes.

To begin with, there is the case of *Watson Brothers* v. *Hornby*,[19] which explicitly decided that it may be necessary, for a proper assessment of trade profits under Case I of Schedule D, to treat a man who supplies himself in his trade as trading with himself on ordinary commercial terms. The decision was given in 1942: it laid down a principle that must continually affect a great many taxpayers: and only now is it said that the case was wrongly decided. I find another instance in *Back* v. *Daniels*,[20] which raised again the difficult problem of taxing part of a taxpayer's activities under Schedule B and another part under Schedule D. The taxpayers in that case were a firm of wholesale potato merchants who carried on business in London, where they sold all the potatoes raised by them on land in the Fen district. The effect of the decision was that the Schedule B assessment on the profits of occupation prevented any assessment under Schedule D in respect of the profit the firm made when they sold the potatoes as wholesale merchants in London. But the interesting point is that the taxpayers did not dispute "that in addition to their liability to "income tax under Schedule B they may be liable to income "tax on a sum in the nature of a commission to themselves for "selling their own potatoes, in the same way as they sell other "people's potatoes in London on the market" (*per* Rowlatt J.).[21] The admission did not seem a strange one to the learned judge. On the contrary, "but that, I think," he said, "is "the limit of their liability." But the "limit" required them to include in the receipts of their London business a commission from themselves, which, of course, they never paid, for selling for themselves their own potatoes. The accounts as between the growing department and the wholesale business were in fact kept on the basis of the one being charged and the other receiving such a commission at the same rate as was charged to other growers. The Special Commissioners who had heard the original appeal had approved a Schedule D assessment on this basis, and the taxpayers did not challenge that computation in the courts.

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[19] 168 L.T. 109.

[20] [1924] 2 K.B. 432; 40 T.L.R. 811; (C.A.) [1925] 1 K.B. 526; 41 T.L.R. 162.

Back v. *Daniels* [22] went to the Court of Appeal, but the only member of that court who made any reference to the commission was Scrutton L.J., whose judgment refers to the Special Commissioners' assessment as including a "conventional commission "assigned to them as salesmen for selling their own potatoes," but makes no comment upon the computation. I ought, too, to refer to the excess profits duty case of *Inland Revenue Commissioners* v. *William Ransom & Son Ltd.*,[23] since it was cited to us in argument. It does afford an instance of the "disintegration" for tax purposes of the profits of a business carried on by a taxpayer in two departments. The produce of one department was transferred to another for processing and distillation, and the internal accounts upon which the separation depended showed that the producing department was credited with a transfer price equal to the market value of the produce on the day of transfer. There was no dispute about figures before the learned judge (Sankey J.), the point before him being whether a part of the profits assessed to excess profits duty should be excluded as being profits of husbandry and exempt as such. He decided that it should. It would not be right to attribute to him any view on the question of principle which is now before your lordships: but it is fair to say that he decided in favour of attributing separate profits to one department of a business which, upon the available accounts, was being charged at market price for the stock transferred from another department.

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[21] [1924] 2 K.B. 432, 449.

[22] [1925] 1 K.B. 526, 541.

[23] [1918] 2 K.B. 709.

The last point that I must mention before I can offer my opinion to your lordships on the present appeal is the place that we should assign to the two decisions: *Laycock* v. *Freeman, Hardy & Willis Ltd.*[24] and *Briton Ferry Steel Co. Ltd.* v. *Barry.*[25] To the Court of Appeal they have seemed to have so direct a bearing upon the present question as to leave them no option but to decide the appeal in favour of the respondent. I am bound to say, with sincere respect for their point of view, that I cannot follow that. I do not regard those decisions as having any true bearing at all upon this appeal. As decisions, obviously, they have not. They are decisions upon the difficult and, often, unsatisfactory question of what constitutes succession to a trade for the purpose of the relevant section of the income tax code. That is a long way from the question now before us. But even the expository passages upon which reliance was placed appear to me to fall short of suggesting any general principle that should guide us, unless it be that if interdepartmental transfers of stock are made at cost that, somehow, represents a "real" figure, whereas a transfer at cost plus a figure of conventional profit represents an unreal one. I am afraid that I do not think that metaphysical distinctions of this sort assist to solve the problem. What do "real" and "unreal" mean in this connexion? If reality depends on the existence of a genuine contract of sale between two independent parties, neither figure is more real than the other. Whether the transfer is between two departments of one legal entity or between two limited companies under the same control, the transfer is effected either by an entry in account or by a dictated sale at a prescribed price. On the other hand, if cost is supposed to be more real than cost plus as a transfer figure because it represents (or by sufficient analysis of general overheads can be thought to represent) expenditure actually incurred, this seems to me a very unsatisfactory test of reality. When transfer is in question it is the current realizable value of what is transferred that presents itself as the natural figure to enter rather than the historical record of what has previously been spent upon it. It is the article, having a current monetary equivalent, that is disposed of, not the previous expenditure. I do not doubt that either figure could be defended as reasonable business practice, but I do demur to a preference for the cost figure being supported by the plea that it somehow enjoys a greater measure of "reality."

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[24] [1939] 2 K.B. 1.

[25] [1940] 1 K.B. 463.

My Lords, with these considerations in mind, I must now say what I believe to be the right way to deal with the present case. When a horse is transferred from the stud farm to the owner's personal account, there is a disposition of trading stock. I do not say that the disposition is made by way of trade, for that is a play on words which may beg the question. At least three methods have been suggested for recording the result in the stud farm's trading accounts. There might be others. Your Lordships must choose between them.

First, there might be no entry of a receipt at all. This method has behind it the logic that nothing in fact is received in consideration of the transfer, and there is no general principle of taxation that assesses a person on the basis of business profits that he might have made but has not chosen to make. Theoretically, a trader can destroy or let waste or give away his stock. I do not notice that he does so in practice, except in special situations that we need not consider. On the other hand, it was not argued before us by the respondent that this method would be the right one to apply: and a tax system which allows business losses to be set off against taxable income from other sources is in my opinion bound to reject such a method because of the absurd anomalies that it would produce as between one taxpayer and another. It would give the self-supplier a quite unfair tax advantage.

Secondly, the figure brought in as a receipt might be cost. That is what the respondent contends for. It is not altogether clear what is to be the basis of such an entry. No sale in the legal sense has taken place nor has there been any actual receipt: the cost basis, therefore, treats the matter as though there had been some sort of deal between the taxpayer and himself but maintains that in principle he can only break even on such a deal. I do not understand why, if he can be supposed to deal at all, he must necessarily deal on such self-denying terms. But then the respondent argues that the cost figure entered as a receipt is to be understood as a mere cancellation of the cost incurred to date. The item of stock transferred to the owner's private account is shown by that very event to have been " withdrawn " from the trade and the only practical course is to write out of the trader's accounts the whole of the cost bona fide, but mistakenly, entered in respect of it. I think this a very attractive argument, but its weakness is that it does not explain why such cancellation should take place. This is not put to us as a case in which, there being no market, cost is the best available estimate of value. The fact that an item of stock is disposed of not by way of sale does not mean that it was any the less part of the trading stock at the moment of disposal. On the contrary, it was part of the stock of the venture at every moment up till then and whatever was spent upon it was rightly entered as a part of the costs and expenses of the trade. Its disposal does not alter that situation. The trade of which the receipts and expenses are in question is the whole activity of farming and the disposal of the produce is only one, though a very important, incident of that activity. I think it a fallacy, therefore, to suppose that the method of disposal can give any warrant for treating costs hitherto properly charged to the trade as if, ex post facto, they never ought to have been charged at all. Yet, if a cancelling entry is not to be made, there must either be a figure entered as a receipt which, admittedly, does not represent any actual legal transaction, or the costs incurred up to the date of disposal must remain on the books to create or contribute to a " loss " of income which common sense suggests to be a fiction.

In a situation where everything is to some extent fictitious, I think that we should prefer the third alternative of entering as a receipt a figure equivalent to the current realizable value of the stock item transferred. In other words, I think that the case of *Watson Brothers* v. *Hornby*[26] was rightly decided and that its principle is applicable to all those cases in which the income tax system requires that part of a taxpayer's activities should be isolated and treated as a self-contained trade. The realizable value figure is neither more nor less " real " than the cost figure, and in my opinion it is to be preferred, for two reasons. First, it gives a fairer measure of assessable trading profit as between one taxpayer and another, for it eliminates variations which are due to no other cause than any one taxpayer's decision as to what proportion of his total product he will supply to himself. A formula which achieves this makes for a more equitable distribution of the burden of tax, and is to be preferred on that account. Secondly, it seems to me better economics to credit the trading owner with the current realizable value of any stock which he has chosen to dispose of without commercial disposal than to credit him with an amount equivalent to the accumulated expenses in respect of that stock. In that sense, the trader's choice is itself the receipt, in that he appropriates value to himself or his donee direct instead of adopting the alternative method of a commercial sale and subsequent appropriation of the proceeds.

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[26] 168 L.T. 109.

LORD TUCKER. My Lords, I would allow this appeal for the reasons which have been stated by my noble and learned friend, Lord Radcliffe.

Appeal allowed.

Solicitors: *Solicitor of Inland Revenue; Withers & Co.*

J. C.*
1955
Dec. 13.

MINISTER OF NATIONAL REVENUE . . APPELLANT;

AND

ANACONDA AMERICAN BRASS LTD. . . RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF CANADA.

Canada — Revenue — Excess profits tax — Manufacturing company — Method of computing profits — Relevant cost of raw materials — F.I.F.O. or first-in-first-out assumption applicable—Proper weight to be given to ascertainable facts — L.I.F.O. or last-in-first-out method inappropriate—(Canadian) Excess Profits Tax Act, 1940, *c.* 32, *s.* 3.

Revenue—Income tax—Profits of trade—Cost of raw materials.

The respondent company carried on the business of purchasing metals, manufacturing them into sheets, rods and tubes and selling the manufactured products. It was constantly purchasing metals to replace those which were being used, but did not keep records from which the actual metals used during the year could be identified or the amounts paid for those metals determined. It did keep records of the quantities of metals (a) in its inventory at the beginning of the year, (b) purchased during the year, and (c) in its inventory at the end of the year. It also kept records of the

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* *Present*: VISCOUNT SIMONDS, LORD OAKSEY, LORD REID, LORD KEITH OF AVONHOLM and LORD SOMERVELL OF HARROW.

J. C.

1955

MINISTER OF NATIONAL REVENUE v. ANACONDA AMERICAN BRASS LTD.

prices paid for the metals purchased from time to time. The company did not know, however, and could not ascertain either in respect of all the metals which it used during the year what price had been paid for them or in respect of all the metals which it had at the end of the year what price had been paid for them. In those circumstances the company, for the purposes of determining its annual profit or gain for income tax purposes for the year 1947, in the absence of knowledge of the proper cost to be ascribed to the metals used during that year and the proper cost or value of the metals remaining in stock, adopted a system known as Lifo or last-in-first-out, in which the cost per pound of the metal most recently purchased and added to stock was the cost per pound of metal content to be charged against the next sale of processed metal products. In 1947 there had been large increases in the price of metals, and by thus attributing the higher costs to the metals processed and the lower cost to those retained in stock the company was able to show far lower profits than if it had followed the accustomed or traditional method of return.

The appellant, the Minister of National Revenue, taking the view that, however appropriate the Lifo method might be for the corporate purposes of the company, it did not truly reflect its profit for income tax purposes, adopted what was known as the Fifo or first-in-first-out method, which assumed that the metal first purchased was the metal first used, with the result that he substantially increased the assessable income of the company, the effect being to increase the assessments on the company for income tax and excess profits tax (only the latter being in issue in this appeal):—

Held, that the Fifo and not the Lifo method must be adopted in the present case. Since the decision in *Whimster & Co.* v. *Inland Revenue Commissioners* (1925) 12 T.C. 813, what was to be valued at the beginning and end of the accounting period had for tax purposes been taken to be the actual stock so far as it could be ascertained. Here there was a large quantity of metal in the 1947 closing inventory to which 1936 cost had been ascribed by the company. The profit of a trade or business was the surplus by which the receipts exceeded the expenditure necessary for the purpose of earning those receipts (*Russell* v. *Town and County Bank* (1888) 13 App.Cas. 418, 424; 4 T.L.R. 500), and no assumption need be made unless the facts could not be ascertained. There was no room for theories as to flow of costs; nor was it legitimate to regard the closing inventory as an unabsorbed residue of cost rather than as a concrete stock of metals awaiting the day of process. It was the failure to observe, or the deliberate disregard of, facts which could be ascertained and must have their proper weight ascribed to them which vitiated the application of the Lifo method in the present case.

New theories of accountancy, though accepted for business purposes, might not necessarily determine income for tax purposes: *Lucas* v. *Kansas City Structural Steel Co.* (1930) 281 U.S. 264, MINISTER OF NATIONAL REVENUE v. ANACONDA AMERICAN BRASS LTD.

268; *Patrick* v. *Broadstone Mills Ltd.* [1954] 1 W.L.R. 158; [1954] 1 All E.R. 163.

Judgment of the Supreme Court of Canada [1954] S.C.R. 737 reversed.

APPEAL (No. 12 of 1955), by special leave, from a majority judgment of the Supreme Court of Canada (November 1, 1954), dismissing an appeal by the present appellant, the Minister of National Revenue, from a judgment of the President of the Exchequer Court of Canada (June 7, 1952), which had allowed an appeal by the respondent company, Anaconda American Brass Ltd., from an assessment made for its 1947 tax year pursuant to the provisions of the Excess Profits Tax Act, 1940.

The respondent company carried on the business of purchasing metals, manufacturing them into sheets, rods and tubes, and selling the manufactured products. On the assessment of the income tax and excess profits tax of the company for the year 1947, the Minister increased the amount of taxable income declared by the company by $1,611,756 as a result of reducing the cost attributed by the company to the metals used by it during the year.

The effect of increasing the taxable income was to increase the excess profits tax of the company for 1947 by about $241,000 and the income tax for that year by about $483,000. Only the excess profits tax was in issue on this appeal, the parties having agreed as regards the income tax to be bound by the outcome of this appeal.

The substantial question in the appeal was whether, as contended by the Minister, in estimating the cost of the metals used by the company during the year the first metals purchased by the company would be the first metals used by it, known as the first-in-first-out, or Fifo, assumption, or whether, as contended for by the company as being the modern accounting practice, the last costs incurred in purchasing the metals were the first costs charged, known as the last-in-first-out, or Lifo, method.

The Exchequer Court of Canada (Thorson P.) and, on appeal, the Supreme Court of Canada (Taschereau, Locke and Cartwright JJ., Kerwin C.J. and Estey J. dissenting) held that the Lifo method was applicable in the circumstances of the present case.

1955. November 15, 16, 17, 21. *C. F. H. Carson Q.C.*, *W. R. Jackett Q.C.*, *Allan Findlay Q.C.* (all of Canada) and *F. N.*

Bucher Q.C. for the appellant. The respondent company is constantly purchasing metals to replace those being used; it did not keep records from which the actual metals used during the year could be identified and from which the amounts paid for those metals could be determined. The company did, however, keep records of the quantities of metals in its inventory at the beginning of the year, the quantities of metals purchased during the year and the quantities of metals in its inventory at the end of the year. It also kept records of the prices paid for the metals purchased from time to time. From the company's records the quantities of metals used during the year could be readily determined, and there is no dispute as to the number of pounds of each metal used. The dispute is as to the *cost* of the metals used during the year. In the absence of records from which the metals in the company's inventory and therefore the metals used during the year could be identified, the Minister could not ascertain the precise cost to the company of the metals used during 1947. What he did was to assume that the metals used during the year were those which had been longest in the inventory, and he determined the cost of those metals from the company's records. His assumption that the first metals to come into the inventory would be the first metals used by the company is known as the first-in-first-out or Fifo assumption.

The company takes the position that the method to be adopted in determining its cost of metals is that which is recognized by modern accounting practice as being the proper method. It contends that the last cost incurred by it in purchasing metals ought to be regarded as the first cost to be charged against the receipts of the company for the year. This method, whereby the last costs incurred are the first costs charged, is known as the last-in-first-out or Lifo method. The effect of applying Lifo, however, is that it is the replacement cost, not the actual cost of metals used, which would be regarded by the company as the expense incurred in manufacturing the products sold in the year. If metal prices never changed—if the first cost was the same as the last cost—then there would be no difference between the results arrived at by applying Fifo or Lifo. That was the situation in the case of this company during the late war when prices of metals were fixed. In 1947, however, very substantial increases took place, which have led to the question which method should be used. The effect of the Minister applying Fifo was to attribute to a substantial part of the metals used a lower price paid by the

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company. The effect of Lifo was to attribute to a substantial part of the metals the higher price paid by the company. The result was that the company's cost of metals for 1947 as determined by the Minister is lower by $1,611,756 than the cost arrived at by the company.

It is submitted: (1) The cost of metals which the company may charge as an expense in arriving at profits for tax purposes is the amount paid by the company for the metals used in the manufactured products sold by it during the year. (2) In determining this amount an estimate must be made because the company's records do not indicate what metals were used in such products. (3) The Minister made an estimate by adopting the Fifo assumption that the first metals purchased would be the metals used in the products sold during the year, so that the last metals purchased would be still in the company's stock. (4) The company is not entitled to adopt the Lifo method unless a more accurate estimate of the amount which they paid for the metals actually used in the products sold during the year can be made by that method than by the Fifo method. (5) The Lifo method as applied by the company is not a method of estimating what metals were in fact used in the year so as to enable the company to estimate the cost of metals used in the year, Lifo is an estimate of replacement cost of the metals. (6) The amount arrived at by applying the Lifo method does not approximate more nearly to the amount which the company paid for the metals used during the year than does the amount arrived at by applying the Fifo assumption.

In *Russell* v. *Town and County Bank* [1] it was said that "the "profit of a trade or business is the surplus by which the receipts "from the trade or business exceed the expenditure necessary for "the purpose of earning those receipts." That is the classical definition of "profit" for tax purposes, and it follows from that that the expenditure on the metals which may be regarded as an expenditure for the earning of the receipts for a given year is what the company paid for the metals used in the manufacture of the products which were sold to earn the receipts of that year, and not the cost of raw materials purchased for use in some future year. The Lifo method is actually the cost of the metals for the replacement of metals used in the year. [Reference was also made to *Farmer* v. *Scottish North American Trust Ltd.* [2];

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[1] (1888) 13 App.Cas. 418, 424; 4 T.L.R. 500.

[2] [1912] A.C. 118, 125; 28 T.L.R. 142.

Whimster & Co. v. *Inland Revenue Commissioners*[3]; *Craddock* v. *Zevo Finance Co. Ltd.*[4]; *General Accident, Fire and Life Assurance Corporation Ltd.* v. *McGowan*[5]; *Sun Insurance Office* v. *Clark.*[6]] Those cases establish the principle that when the profits or gains of a business for a year cannot be determined with certainty an estimate must be made, and when the taxing Act does not prescribe a particular method of estimate to be used—and the relevant Act here does not—that method should be used which approximates most nearly to the truth. That principle applies in this case. On the method adopted in this case it has always been open to the taxpayer to show that some other method would give more accurate results.

It would be inconsistent with the scheme of the Act to permit a taxpayer to charge as his costs of earning 1947 receipts what he had paid in order to earn 1948 receipts. The difference between the rule as to running expenses, as in *Vallambrosa Rubber Co. Ltd.* v. *Farmer,*[7] and the rule as to expenditure on stock in trade is explained by Rowlatt J. in *Naval Colliery Co. Ltd.* v. *Inland Revenue Commissioners.*[8] *Absalom* v. *Talbot*[9] raised the question as to how that part of the price which was to be paid in the future was to be taken into account in determining profits; there was no disagreement as to the meaning of "profits."

The respondent company contended that the actual physical flow of raw materials and processed goods is irrelevant in determining whether Lifo or Fifo is the accounting method appropriate to determine the annual profits of a particular business. The Minister applied Fifo, however, on an assumption of the physical flow. Lifo reflects a recent change in accounting principles. Originally Fifo was based on an assumption of the physical flow of goods. It is submitted that the amount arrived at by the Minister was a much more accurate estimate of what the company actually paid for the stock-in-trade than the company's figure. The criticism of the base stock method in *Lucas* v. *Kansas City Structural Steel Co.*[10] is, on the evidence in the present case, equally applicable to Lifo in this case. The relevant legislation in 1930 in the United States of America shows that when Lifo was there permitted some very important conditions were laid down so as to protect the Revenue. Lifo has never

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[3] (1925) 12 T.C. 813, 823.

[4] (1946) 27 T.C. 267, 287.

[5] [1908] A.C. 207, 210; 24 T.L.R. 533.

[6] [1912] A.C. 443, 450, 455; 28 T.L.R. 303.

[7] (1910) 5 T.C. 529.

[8] (1926) 12 T.C. 1017, 1027.

[9] [1944] A.C. 204, 211; 60 T.L.R. 434; [1944] 1 All E.R. 642.

[10] (1930) 281 U.S. 264, 268.

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been recognized by the Revenue authorities in Canada as being an acceptable method; but the effect of the Supreme Court's decision in this case would be that Lifo could be adopted in Canada without being subject to any conditions. In the absence of any decision on the point in England, it would appear that Lifo has not been permitted for tax purposes here; an attempt was made to adopt the base stock method, but it is not a proper method for determining profits for tax purposes: *Patrick* v. *Broadstone Mills Ltd.*[11]

Those witnesses in the present case who said that Lifo is the best method of arriving at the profits of the company should not be interpreted as expressing opinions as to what constitutes "profits" within the meaning of the tax legislation; that is purely a legal question for the courts to decide. When any accountancy evidence is based on an erroneous view of the law that evidence is not conclusive: *Inland Revenue Commissioners* v. *Gardner, Mountain & D'Ambrumenil Ltd.*[12]; *Ryan* v. *Asia Mill Ltd.*[13]; in the latter case the House of Lords did not consider themselves bound to accept the accountancy practice, and, indeed, reached a conclusion opposite to that of the accountancy evidence. If the respondent is right it would mean that one taxpayer might be taxed on the basis of replacement cost and another on the basis of actual cost. The issue here raises an important question of law, namely, whether the cost which may be deducted as an expenditure in arriving at the profit as defined by the authorities is actual cost or replacement cost. It is submitted that the President of the Exchequer Court and the three majority judges in the Supreme Court of Canada did not in their judgments deal with that issue at all.

Kenneth Diplock Q.C., *A. S. Pattillo Q.C.* (Canada) and *A. J. MacIntosh* (Canada) for the respondent. The primary question in this case is whether there is a rule of law that in estimating the annual profit of a manufacturing business there must in all circumstances be charged as an expense the cost of the materials actually used in the manufactured products sold during the year, even although to estimate the profit in this way would be contrary to commonly accepted commercial and accounting principles. No witness in this case suggested that in all circumstances to follow that rule of law would be in accordance with accepted commercial and accounting principles. If there is no such rule of law, and it is submitted that there is not, and the annual profit is accordingly to be estimated in accordance with commonly accepted commercial and accountancy principles, then because what are those principles and what are the profits estimated in accordance with them are questions of fact, there are here concurrent findings of the courts below which this Board will not disturb. It is conceded that if there is such a rule as the appellant contends for, this appeal succeeds. It succeeds not because it is established that Fifo does in this case give a more accurate estimate of cost of materials actually used, or that Fifo is designed to do so; it succeeds simply because the respondent has not established that the figure obtained by it gives a more accurate estimate than the Minister's figure.

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[11] [1954] 1 W.L.R. 158; [1954] 1 All E.R. 163.

[12] (1945) 29 T.C. 69, 76.

[13] (1951) 32 T.C. 275, 296–297, 300.

The contentions of the respondent are: (1) There is no such rule of law as contended for by the appellant. (2) The only rule is that annual profits are to be estimated in accordance with commonly accepted commercial and accountancy principles. (3) The rule is qualified where express conditions to the contrary are laid down in the Act—which does not apply to this case. (4) The President of the Exchequer Court and the majority of the Supreme Court directed their minds to the right issue in this case. (5) Their findings that the use of Lifo as the basis of estimated costs of sale in 1947 most accurately determined the true profits are findings of fact which ought not to be disturbed.

It is hoped to demonstrate that the rule is the same in England; but in saying that there are two comments: (i) ordinary principles of commercial accounting may not be the same in Canada as in England; (ii) it is Canadian practice with which the Board is concerned, and it is submitted that the fact that a particular method of ascertaining profits appears or might appear to this court to be barred or illogical or unrealistic would not in any event entitle the court to reject it if it were in accordance with ordinary principles of commercial accounting. The rule in England is that profits must be ascertained in accordance with ordinary principles of commercial accounting, or, put another way, there is no difference between annual profits for tax purposes and what a business man or accountant means by annual profits: *Gresham Life Assurance Society* v. *Styles*[14]; *Usher's Wiltshire Brewery Ltd.* v. *Bruce*[15]; *Lowry* v. *Consolidated African Selection Trust Ltd.*[16] To say that one can take the sale without the consequent replenishment of stock is on the evidence not in accordance with commercial accounting principles, whether it be for income tax or for the purposes of the company. [*Russell* v. *Town and County Bank* [17] was referred to.] Another case on what is an expenditure regardless of the year in which it occurred is *Farmer* v. *Scottish North American Trust Ltd.*[18] The profit ascertained by the specific identification method is not the true profit in the commercial sense.

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[14] [1892] A.C. 309, 316, 321; 8 T.L.R. 618.

[15] [1915] A.C. 433, 444, 473; 31 T.L.R. 104.

[16] [1940] A.C. 648, 661; 56 T.L.R. 735.

It is accepted as a general principle that one cannot charge costs until they have been incurred. The question is what portion of incurred costs was an expense of earning the income of the business for the particular year. One has to attribute incurred costs to the business done in the particular year and not to particular transactions during that year. The way in which one attributes is a question of commercial practice so as to arrive at what a business man or accountant in Canada would call the true profit of the year. There is nothing in *Coltness Iron Co.* v. *Black* [19] which gives rise for credence that profits of a business for income tax purposes are other or different from ordinary commercial profits in the sense in which business men would understand them. Costs incurred in acquiring stock-in-trade are no different from other costs incurred in the course of the business. Again, in *Whimster & Co.* v. *Inland Revenue Commissioners* [20] there is nothing which suggests that the income for the purposes of the taxing Act is in any respect different from the income for ordinary commercial purposes. [Reference was also made to the *Vallambrosa Rubber* case,[21] *McGowan's* case [22] and *Ryan's* case.[23]] Considerable reliance was placed by the appellant on *Sun Insurance Office* v. *Clark*,[24] but the effect of that case is that one has to use a method of estimating, and the only rule is that the method must be such that the result must closely approach the true gains.

The above cases were relied on by the Chief Justice in the Supreme Court; none of them laid down any such rule as the appellant contends for; none of them suggests that what is profit for the purposes of a trader's ordinary account differs from what is profit for the purposes of tax, except where there are special provisions in the taxing Act. Other cases cited by counsel for the appellant were so far from the problem in this case that it

[17] 13 App.Cas. 418, 424.
[18] [1912] A.C. 118, 125.
[19] (1881) 6 App.Cas. 315, 323.
[20] 12 T.C. 813.
[21] 5 T.C. 529.
[22] [1908] A.C. 207.
[23] 32 T.C. 275.
[24] [1912] A.C. 443.

is submitted that no useful principle can be drawn from them. Reference should be made, however, to *Patrick* v. *Broadstone Mills Ltd.*[25] and to the American case of *Lucas* v. *Kansas City Structural Steel Co.*[26] The United States' legislation was amended to give the taxpayer an option to elect to use Lifo if he desired; the effect of that amendment was to take away a discretion which the commissioner had. It was said in *Dominion Taxi-cab Association* v. *Minister of National Revenue*[27] that profits must be determined on ordinary commercial principles unless the Act required a departure from them; that judgment was delivered on February 15, 1954, and the present case was heard just under a month afterwards. There are here findings of fact after consideration of the accountancy evidence by the President and by the majority of the Supreme Court, and arrived at by applying their minds to the correct question.

Summarizing: the only authority for the alleged rule of Canadian law on which the appellant relies is the dissenting judgment of the Chief Justice in the present case. The English authorities establish no such rule of law. The right question, to which the courts directed their minds, was: what are the profits of the respondent company for 1947 determined upon ordinary principles of commercial trading or accepted business and accountancy principles? What those principles are is a question of fact to be decided on evidence, and the concurrent findings of fact should not be disturbed.

Pattillo Q.C. followed. There was proper and ample evidence before the President of the Exchequer Court to enable him to make, and to support, the findings which he did. It was a question of fact for the trial judge as to (a) what were the commercial accounting principles in Canada; (b) what principles were to be applied in Canada having regard to the way that this company carried on its business; and (c) what method most nearly accurately ascertained the company's annual profit, which in this case would be the same thing as its taxable profit. The trial judge found these facts in favour of the company, and in doing so accepted the evidence of the company's witnesses and rejected that of the Crown, as he was entitled to. His findings of fact were concurred in by the majority of the Supreme Court and they should not be disturbed.

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[25] [1954] 1 W.L.R. 158.

[26] 281 U.S. 264.

[27] [1954] S.C.R. 82, 85.

Carson Q.C., in reply, referred to *Johnston* v. *Minister of National Revenue*[28] and *Anderson Logging Co.* v. *The King.*[29]

December 13. The judgment of their Lordships was delivered by VISCOUNT SIMONDS. This appeal from a judgment of the Supreme Court of Canada, which dismissed an appeal from a judgment of the President of the Exchequer Court of Canada, raises a question of novelty and importance. The appellant is the Minister of National Revenue, the respondent a limited company, Anaconda American Brass Ltd.

The Minister, on the assessment of the respondent company to income tax and excess profits tax for the year 1947, increased the amount of taxable income declared by the company by the sum of $1,611,756.43, with the result that its excess profits tax for that year was increased by about $241,000 and its income tax by about $483,000. Against this assessment the company appealed to the Exchequer Court: the President of the court allowed the appeal and, as already stated, the Supreme Court dismissed the Minister's appeal from his judgment. It is only the excess profits tax with which this appeal is concerned.

The excess profits tax is levied under the provisions of the Excess Profits Tax Act, 1940, which by section 3 provides that in addition to any other tax or duty payable under any Act there shall be assessed, levied and paid a tax in accordance with the rate set out in the Second Schedule thereto upon the excess profits of every corporation or joint stock company residing or ordinarily resident in Canada or carrying on business in Canada. The rate set out in the Second Schedule is 15 per cent. of the excess profits in the case of corporations or joint stock companies. "Profits" in their case is by the same Act defined to mean for any taxation period the amount of net taxable income for the same period as determined under the provisions of the Income War Tax Act. Under the latter Act income is, so far as is relevant, defined as meaning the annual net profit or gain ascertained and capable of computation as being the profits from a trade or commercial or financial or other business.

The question, then, is whether the Minister correctly assessed the annual net profit or gain of the company for the year 1947 or, to state the question more accurately, whether the company has established that his assessment was incorrect.

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[28] [1948] S.C.R. 486.

[29] [1925] S.C.R. 45, 50.

The material facts of the case are not in dispute.

The company carries on the business of purchasing metals, manufacturing them into sheets, rods and tubes and selling the manufactured metals. About 98 per cent. of the metals purchased by the company consist of copper (over 80 per cent.) and zinc (about 15 per cent.). The other principal metals are lead, tin and nickel. The prices which the company charges for its products are closely related to the prices paid by it to replace the metals used in manufacturing its products, and, when market prices of purchased metals are increased, it at once correspondingly increases the prices of its products.

The company is constantly purchasing metals to replace those that are being used. Its practice is to make an estimate at the beginning of each month of the quantity of metals which will be used during the next month and to order from its suppliers the same quantity to replace such metals. It maintains an inventory or stock of metals at all times of about one-third to one-quarter of its annual requirements, so that it turns over its inventory three or four times a year. About two-thirds of the copper and zinc inventory is continuously in process in the plant: this indicates that the average time in process is about eight weeks.

The company did not keep records from which the actual metals used during the year could be identified or the amounts paid for those metals determined. But it kept records of the quantities of metals (a) in its inventory at the beginning of the year, (b) purchased during the year, and (c) in its inventory at the end of the year. It also kept records of the prices paid for the metals purchased from time to time.

Thus in the year 1947 the company knew what stock it had in hand at the beginning, what stock it had purchased during the year, and what stock it had in hand at the end of it. It also knew what prices it had paid during the year for the metals it purchased. But it did not know and could not ascertain either in respect of all the metals which it used during the year what price had been paid for them or in respect of all the metals which it had at the end of the year what price had been paid for them. Yet in order to determine its annual profit or gain for the year 1947 it is necessary to ascribe the proper cost to the metals used and the proper cost or value to the metals remaining in stock. In the absence of knowledge an assumption or estimate must be made and it is at this stage that the difference between the parties arises.

It is convenient first to explain the manner in which the company made up its return for the year 1947, stating only by way of premise that, whereas the prices of raw materials had for some time before that year been comparatively stable, in that year, as the result of the relaxation and then the removal of war-time controls, there had been large increases of price, for example, of copper on January 22 from 11·5 cents per pound to 16·625 cents per pound and on June 10 to 21·5 cents per pound. It was under these circumstances that in 1947 for the first time the company made a return for income tax purposes in which a system known as Lifo, or last-in-first-out, was adopted. It was a system which it had used for its own corporate purposes for some time previously in respect of copper, but neither it nor any other taxpayer in Canada had adopted it for taxation purposes. It must now be briefly explained.

It must in the first place be explained that Lifo does not mean that the metal last to be received into stock is in fact the first to be processed and sold. On the contrary, the actual physical flow of the raw material is regarded as irrelevant: that which was purchased in previous years and was in stock at the opening of the relevant financial year or that which was purchased during that year may have been processed and the products sold during that year: this is of no account. It is to cost that Lifo looks, and in the simplest terms it means that the cost per pound of the metal most recently purchased and added to stock is the cost per pound of metal content to be charged against the next sale of processed metal products. It is the necessary corollary of this that to the stock which is in fact in hand at the end of the year there must be attributed the cost of metal which has not yet been exhausted by the cost attributed to metal consumed; this has been called the unabsorbed residue of cost. Thus in the case under appeal the stock of copper in hand at the close of the year 1947 (the "closing inventory" as it is conveniently called) consisted of 14,291,007 pounds: and under the Lifo system it was treated as follows:

(A) 6,500,000 pounds were regarded as having a cost of 7·5 cents per pound (the average cost of the copper in the inventory when Lifo was adopted in 1936) amounting to $487,500;

(B) 802,697 pounds were regarded as having a cost of 9·466

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cents per pound (the average price paid in 1936) amounting to $75,983.30;

(c) 17,577 pounds were regarded as having a cost of 11·191 cents per pound (the average price paid in 1937) amounting to $1,967.04;

(d) 639,807 pounds were regarded as having a cost of 10·443 cents per pound (the average price paid in 1938) amounting to $66,847.04;

(e) 973,477 pounds were regarded as having a cost of 11·036 cents per pound (the average price paid in 1939) amounting to $107,432.92;

(f) 3,151,684 pounds were regarded as having a cost of 11·5 cents per pound (the price paid in 1945) amounting to $362,443.66;

(g) 2,205,765 pounds were regarded as having a cost of 11·5 cents per pound (the price paid in 1946) amounting to $253,662.97.

The total cost of the 14,291,007 pounds of copper in the closing inventory was thus assumed to have been $1,355,836.93, and this was the figure attributed to the closing inventory in the return for income tax. It is to be observed that the price attributed by the company to nearly half its inventory was 7·5 cents per pound, a price less than any price prevailing since 1935. The result is obvious. By attributing the higher cost to the metals processed and the lower cost to those retained in stock the company was able to show far lower profits than if it had followed the accustomed and traditional method of return. The question is whether the new method is permissible for income tax purposes.

It is necessary to emphasize the words "for income tax "purposes." For a large part of the argument upon this appeal and throughout the proceedings has been devoted to showing that in Canada the Lifo method is in certain conditions a proper and generally accepted method of accountancy and that those conditions are conspicuously present in the case of the appellant company. This was the view accepted by the President of the Exchequer Court of Canada and by the Supreme Court. It is accepted unreservedly also by their Lordships.

The appellant Minister took the view that, however appropriate the Lifo method might be for the corporate purposes of the company, it did not truly reflect its profit for income tax purposes. He accordingly increased the assessable income by the sum of

$1,611,756.43. In doing so he adopted the method known as the Fifo or first-in-first-out method, which assumes that the metal first purchased is the metal first used. Upon this assumption the metal in stock at the end of the year 1947 was the metal most recently purchased, and inasmuch as it appeared that during the year 1947 the company purchased no less than 63,268,555 pounds of copper and more than 14,291,007 pounds (the quantity in the closing inventory) had been purchased at the price of 21·5 cents per pound in the last three months of the year, he determined the cost of the copper in the closing inventory at $3,072,566.50. This figure may be contrasted with the $1,355,836.93 appearing in the company's return.

At this point it is possible to define more closely the position of the parties. The Minister concedes that in the absence of physical identification some assumption about the material in fact used during the financial year must be made. He does not dispute that there may be in the closing inventory some metal which had been purchased in previous years. But he contends that the method which he has adopted attains more nearly the result postulated by Lord Loreburn L.C. in *Sun Insurance Office* v. *Clark*[1] "that the true gains are to be ascertained as nearly "as it can be done." He urges that it is a principle of income tax law which has been adopted from commercial accounting practice that the values of the stock-in-trade at the beginning and end of the period covered by the account should be entered at cost or market value, whichever is the lower, and he says that for this purpose the actual stock in hand must be regarded and its actual cost so far as possible ascertained, and that an assumption or estimate is necessary only so far as ascertainment is not possible. Upon this basis he says that the Fifo method more nearly than the Lifo method represents the facts, and supports that contention by reference not only to the large purchases of metal during the last months of 1947, which can hardly have been processed during that year, but also to the fact that the Lifo method involves the assumption of 6,500,000 pounds of copper purchased in or before 1936 being still in stock at the end of 1947. He says, therefore, that his assessment has not been displaced by any evidence that the Lifo method more nearly represents the true income of the company. He is not concerned to contend that the company (or some other taxpayer) may not be able to establish that some other method than Fifo more accurately represents the income for tax purposes where the raw material used is homogeneous and no substantial part of it can be identified. Nor is it necessary for their Lordships to determine whether some other method, as for instance the "average cost" method, may not in some circumstances be properly adopted for tax purposes. What the Minister urges is that the Lifo method does not more nearly than Fifo produce the true income in the present case, and that is the question for their Lordships' decision.

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[1] [1912] A.C. 443, 454; 28 T.L.R. 303; 6 T.C. 59.

The company, on the other hand, contends that, inasmuch as the Income War Tax Act does not contain any definition of "annual net profit or gain," nor any directions how profits or cost of sales are to be ascertained, these matters can only be determined by the application of ordinary commercial principles except where such principles are expressly excluded by the Act. It then says that it is a question of fact what are ordinary commercial principles and that the President of the Exchequer Court has found as a fact, and the majority of the Supreme Court has concurred in his finding, that the company's return had been made in accordance with those principles. The contention, in short, is that annual income for income tax purposes is determined by accepted accountancy practice unless the Act otherwise provides, and that in the present case the President has found not only that Lifo was an acceptable accounting method but that it was the most acceptable method and that the method adopted by the Minister was not a proper one.

These contentions of the company have been, in their Lordships' opinion, rightly rejected by the minority of the Supreme Court (Kerwin C.J. and Estey J.). The income tax law of Canada, as of the United Kingdom, is built upon the foundations described by Lord Clyde in *Whimster & Co.* v. *Inland Revenue Commissioners*[2] in a passage cited by the Chief Justice which may be here repeated. "In the first place, the profits of any "particular year or accounting period must be taken to consist "of the difference between the receipts from the trade or business "*during such year or accounting period* and the expenditure laid "out to earn *those receipts*. In the second place, the account of "profit and loss to be made up for the purpose of *ascertaining* "*that difference* must be framed consistently with the ordinary "principles of commercial accounting, so far as applicable, and

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[2] (1925) 12 T.C. 813, 823.

"in conformity with the rules of the Income Tax Act, or of "that Act as modified by the provisions and schedules of the "Acts regulating Excess Profits Duty, as the case may be. For "example, the ordinary principles of commercial accounting "require that in the profit and loss account of a merchant's or "manufacturer's business the values of the stock-in-trade at the "beginning and at the end of the period covered by the account "should be entered at cost or market price, whichever is the "lower; although there is nothing about this in the taxing "statutes." For many years before and ever since this decision what is to be valued at the beginning and end of the accounting period has for tax purposes been taken to be the actual stock so far as it can be ascertained. It is in fact, so far as tax law is concerned, a novel and even revolutionary proposal that the physical facts should even where they can wholly or partly be ascertained be disregarded for the purpose of the opening and closing inventory and a theoretical assumption made which is based on a supposed "flow of cost" and an "unabsorbed residue "of cost." An expert witness called for the company observed that he did not imagine any of the company's witnesses would claim for a minute that there was a quantity of metal then on hand acquired in the year 1936 equal to the quantity which was valued at the then cost. Yet there was no less than six and a half million pounds of copper in the 1947 closing inventory to which the 1936 cost was ascribed. He might have added that year by year the same thing would happen so long as the business went on and existing stocks were not seriously diminished: in 1987 as in 1947 the closing inventory would carry stock to which 1936 costs would be ascribed. This illustrates clearly the Lifo method and shows how far it has travelled from the conception which has prevailed in the assessment of income for tax purposes.

It was strongly pressed by the respondent that in dealing with homogeneous material the actual user test, if it could be applied by identification of parcels purchased at varying prices, would lead to capricious and illogical results. Assuming that this is so and that actual user should not in some cases be regarded as the final test, this does not in their Lordships opinion establish the case for Lifo. It might be that in such cases, though their Lordships do not decide it, the average cost method could properly be adopted, for that method, like the Fifo method, brings into the account the cost of every purchase

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in its order. But the present case shows that under the Lifo method, if the business continues and stock is carried forward, substantial purchases may never come into the profit account at all.

Their Lordships do not question that the Lifo method or some variant of it may be appropriate for the corporate purposes of a trading company. Business men and their accountant advisers must have in mind not only the fiscal year with which alone the Minister is concerned. It may well be prudent for them to carry in their books stock valued at a figure which represents neither market value nor its actual cost but the lower cost at which similar stock was bought long ago. A hidden reserve is thus created which may be of use in future years. But the Income Tax Act is not in the year 1947 concerned with the years 1948 or 1949: by that time the company may have gone out of existence and its assets been distributed. Seventy years ago Lord Herschell said in *Russell* v. *Town and County Bank*[3]: "The profit of a trade or business is the surplus "by which the receipts from the trade or business exceed the "expenditure necessary for the purpose of earning those "receipts." This is only one of many judicial observations in which it is implicit that no assumption need be made unless the facts cannot be ascertained, and then only to the extent to which they cannot be ascertained. There is no room for theories as to flow of costs, nor is it legitimate to regard the closing inventory as an unabsorbed residue of cost rather than as a concrete stock of metals awaiting the day of process. It is in their Lordships' opinion the failure to observe, or, perhaps it should be said, the deliberate disregard of, facts which can be ascertained and must have their proper weight ascribed to them, which vitiates the application of the Lifo method to the present case. It is the same consideration which makes it clear that the evidence of expert witnesses, that the Lifo method is a generally acceptable, and in this case the most appropriate, method of accountancy, is not conclusive of the question that the court has to decide. That may be found as a fact by the Exchequer Court and affirmed by the Supreme Court. The question remains whether it conforms to the prescription of the Income Tax Act. As already indicated, in their Lordships' opinion it does not.

The history of the adoption of the Lifo method in Canada by the company and presumably by other companies is of some interest. The method appears to have originated in the U.S.A. and there to have been adopted by an American corporation which was the parent of the respondent company some time before 1938. But it was only by an amendment of the existing revenue law that it was in that year permitted to be adopted for tax purposes. In 1939 further amendments were made and the method is now permitted subject to statutory conditions which are summarized in the judgment of Estey J. in the Supreme Court. The many differences which exist between the revenue laws of the U.S.A. and Canada do not permit too much weight to be given to the fact that it is sought to do in Canada without legislation what in the U.S.A. is only permissible with statutory safeguards. But it at least supports the view that new theories of accountancy, though they may be accepted and put into practice by business men, do not finally determine a trading company's income for tax purposes. Again, though their Lordships recognize that this appeal must be determined by reference to Canadian law, they notice that in the U.S.A., in a case in which the so-called " base " stock " method was under discussion, Brandeis J. used words which are apt to describe the Lifo method also. " In years of " rising prices, the ' base stock ' method causes an understate- " ment of income; for it disregards the gains actually realized " through liquidation of low price stock on a high price market. " . . . This method may, like many reserves which business men " set up on their books for their own purposes, serve to equalize " the results of operations during a series of years . . .": see *Lucas* v. *Kansas City Structural Steel Co.*[4] In this passage the distinction is nicely made between what is permitted for tax purposes and what prudent business men may think fit to do.

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[3] (1888) 13 App.Cas. 418, 424; 4 T.L.R. 500.

So, also, in the United Kingdom an attempt has been vainly made to uphold the base stock method for income tax purposes. In the recent case of *Patrick* v. *Broadstone Mills Ltd.*[5] Singleton L.J., in words that are equally apt if applied to the Lifo method, declined to accept the base stock method as conformable to income tax law, though it might be approved by accountancy practice.

In the result their Lordships are of opinion that this appeal must be allowed, the judgments of the Supreme Court and the

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[4] (1930) 281 U.S. 264, 268–269.

[5] [1954] 1 W.L.R. 158; [1954] 1 All E.R. 163.

Exchequer Court set aside and the appeal of the respondent company from the Minister's assessment rejected, and they will humbly advise Her Majesty accordingly. They repeat that they have reached this conclusion not because they dissent from any finding of fact by the President of the Exchequer Court, of whose lucid and exhaustive judgment no criticism can from this aspect fairly be made, but because his findings of fact do not offer a complete solution of the question.

The respondent company must pay the costs of this appeal and of the proceedings in the courts of Canada.

Solicitors: *Charles Russell & Co.; Beaumont & Son.*

[HOUSE OF LORDS.]

H. L. (E.)*
1955
June 27, 28, 29, 30;
July 4;
Nov. 7.

BONSOR . . . . APPELLANT;

AND

MUSICIANS' UNION . . . . . RESPONDENT.

Trade Union—Whether legal entity—Action against union by member—Expulsion of member—Rules of union—Expulsion ultra vires—Claim for damages—Nature of contract between trade union and members—Whether trade union a legal entity vis-à-vis members—Trade Union Act, 1871 (34 *&* 35 *Vict. c.* 31).

A member of a registered trade union was wrongfully expelled from it:—

Held, that he was entitled to maintain an action for damages for breach of contract against the union in its registered name.

Per Lord MacDermott, Lord Keith of Avonholm and Lord Somervell of Harrow: Although a registered trade union is not a juristic person distinguishable at any moment of time from the members of which it is at that time composed, (1) the action was not barred on the ground that in suing the union the expelled member was suing himself among others, since the agents of the union responsible for his expulsion could not in law be taken to have been acting as his agents, and (2) a registered trade union is capable of being sued in its own name (irrespective of its membership at any particular time); the damages, if any, would then be recoverable and only be recoverable from its funds.

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* *Present*: LORD MORTON OF HENRYTON, LORD PORTER, LORD MACDERMOTT, LORD KEITH OF AVONHOLM and LORD SOMERVELL OF HARROW.

Per Lord Morton of Henryton and Lord Porter: A registered trade union, though not an incorporated body, is capable of entering into contracts and of being sued as a legal entity, distinct from its individual members.

Per Lord Keith of Avonholm: The legal characteristics of a registered trade union differentiate it from other voluntary associations and may entitle it to be called a legal entity, while at the same time remaining an unincorporated association of individuals.

Kelly v. *National Society of Operative Printers' Assistants* (1915) 84 L.J.K.B. 2236; 31 T.L.R. 632 overruled.

Taff Vale Railway Co. v. *Amalgamated Society of Railway Servants* [1901] A.C. 426; 17 T.L.R. 698; *Amalgamated Society of Carpenters, Cabinet Makers and Joiners* v. *Braithwaite* [1922] 2 A.C. 440; 38 T.L.R. 879 applied.

National Union of General and Municipal Workers v. *Gillian* [1946] K.B. 81; 62 T.L.R. 46; [1945] 2 All E.R. 593 approved.

Decision of the Court of Appeal [1954] Ch. 479; [1954] 1 All E.R. 822 reversed.

APPEAL from the Court of Appeal (Evershed M.R. and Jenkins L.J., Denning L.J. dissenting).

This was an appeal from a judgment of the Court of Appeal dated February 16, 1954, whereby the court dismissed the appeal of Harry Bonsor, the original appellant, against the judgment of Upjohn J. given on April 17, 1953, granting him a declaration and an injunction against the respondents, the Musicians' Union, but rejecting his claim for damages in respect of his wrongful expulsion from membership of the respondent union, and made no order as to the costs of the appeal.

After the decision of the Court of Appeal had been delivered on March 5, 1954, the court was informed that the original appellant had died on the previous day. Accordingly, on March 16, an order was made, counsel for the respondents not objecting, that judgment be entered and ante-dated February 16, 1954. The original appellant's widow, Mary Claire Bonsor, having obtained letters of administration on July 24, 1954, it was ordered on August 5, 1954, that the proceedings should be carried on between her as appellant and the respondents.

Mr. Bonsor joined the respondent union, which was a registered trade union, some time before the year 1947. In the year 1949 the union purported to expel him from its membership. The results of that expulsion were described by Upjohn J. in his judgment as follows: "The plaintiff is aged some 50 years and has all his "life been a professional musician. He joined the Musicians' "Union through the Liverpool branch some time before 1947. "The Musicians' Union is what is familiarly known as a 'closed "'shop union.' That is to say, it is virtually impossible to get "employment or engagement as a musician unless the musician "is a member of the union. That, indeed, has been strikingly "illustrated in this case, for after his expulsion the plaintiff "was unable to obtain any employment except at Cheltenham "for a short time with a non-union orchestra. He was, apart "from that, unable to get any employment and he has had to "seek his livelihood in entirely different spheres. He was at "one time even reduced to accepting employment to remove "rust from a Brighton pier, and he is now earning a wage of "some £6 a week in some engineering works, whereas formerly, "earning his livelihood as a musician, he was earning sums "certainly well in excess of £10 a week."

On October 8, 1952, Mr. Bonsor issued the writ in the present action, claiming a declaration that his expulsion was wrongful, null and void, and, after obtaining an amendment of his claim, an injunction restraining the respondent, its servants and agents, from acting on the purported expulsion, damages and costs. Upjohn J. granted the declaration and injunction and costs, but dismissed the claim for damages, holding himself bound so to do by reason of the decision of the Court of Appeal in 1915 in *Kelly* v. *National Society of Operative Printers' Assistants*.[1] He held (*a*) that the secretary of the union's Brighton branch, purporting to act under a particular rule dealing with members whose subscriptions were in arrear, erased Mr. Bonsor's name from the register of membership on July 2, 1949, and (*b*) that the branch secretary was not empowered to act in this manner and had done so in breach of the rules.

The respondent union appealed against the part of the judgment which granted the declaration and injunction, and Mr. Bonsor cross-appealed against the dismissal of his claim for damages. The Court of Appeal dismissed the union's appeal and dismissed the cross-appeal by a majority (Evershed M.R. and Jenkins L.J., Denning L.J., dissenting).

By rule XIX (1) of the union's rules, dated 1952, dealing with "eligibility for membership": ". . . any person following the "profession of music . . . shall be eligible for membership." By rule XXII, dealing with " entrance ": " The entrance fee for " membership shall not be less than 10s., but the branch com- " mittee, subject to the approval of the executive committee, " may . . . raise it . . . (1A) The branch committee may . . . " resolve that any individual candidate before being admitted to " membership shall in addition to paying the entrance fee . . . " pay a premium, the amount of such premium to be determined " by the branch committee or, if the branch committee so decide, " by a general meeting of the branch. Any decision taken under " section (1A) shall be subject to the endorsement of the execu- " tive committee. (2) Candidates for admission into this union " shall make application in writing (on the form provided for the " purpose) to one of the secretaries . . . (3) . . . Every admission " to be decided by a majority of the members of the executive " committee or branch committee."

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[1] (1915) 84 L.J.K.B. 2236; 31 T.L.R. 632.

The form of application for admission was addressed to the secretary of the branch and, when completed by him, was to be forwarded with the return of new members monthly to the national office of the union. It was admitted that there had been no material change in the rules since Mr. Bonsor's admission.

Lester for the appellant. The question is whether *Kelly* v. *National Society of Operative Printers' Assistants* [1] is binding. In these days, when unions are more and more adopting a " closed " shop " policy, they can inflict great hardship on individuals, and it would be strange if the law provided no remedy in damages for a wrongfully expelled member of a trade union though there is authority that a member may be protected from wrongful expulsion by declaration and injunction. The respondents contend that in law a trade union is not a legal entity but only a convenient name for designating the members collectively. But in the face of the authorities dealing with declarations and injunctions this cannot be so. Unions have been given by law rights and duties and are to be regarded as legal entities. In law a person is any being which the law regards as capable of rights and duties. There is the natural person; there is also the incorporated body created and recognized by law.

Trade unions generally have been given by Act of Parliament extraordinary privileges and rights and have been made subject to duties. *Taff Vale Railway Co.* v. *Amalgamated Society of Railway Servants* [2] is the starting point of the argument. There the status of a trade union was in question and Lord Brampton[3] said in terms that it was "a legal entity." *Yorkshire Miners' Association* v. *Howden*[4] was the first case where the parties were a trade union and a member concerned with preventing it from wrongfully dissipating its funds. In *Amalgamated Society of Railway Servants* v. *Osborne*[5] a member resisting a political levy by a trade union obtained a declaration and an injunction. A registered trade union was recognized as being able to act as a person. In *Osborne* v. *Amalgamated Society of Railway Servants*[6] the plaintiff, who had been expelled, obtained a declaration and an injunction. This case was affirmed and approved in *Amalgamated Society of Carpenters, Cabinet Makers and Joiners* v. *Braithwaite*.[7] As to the suggestion that a trade union is merely a collective name to designate the members, see *Russell* v. *Amalgamated Society of Carpenters and Joiners*.[8] *Kelly* v. *National Society of Operative Printers' Assistants*[9] is on all fours with the present case, and the Court of Appeal, considering itself bound by it, held that the present claim for damages was not maintainable, because (1) it was said that the action was by the plaintiff against himself and the other members, and (2) the committee, since they were officers of the union, were officers of each and every member of the union and accordingly were the plaintiff's agents. This case should be overruled. Alternatively, if it stands, it is distinguishable from the case of the present union, the rules of which amount to an agreement between it and the members and not solely to an agreement of the members inter se.

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[1] 84 L.J.K.B. 2236.

[2] [1901] A.C. 426; 17 T.L.R. 698.

Kelly's case[9] was criticized in *Rex* v. *Cheshire County Court Judge*,[10] and Scrutton L.J. said that he could not see any explanation why, if the member could not get damages, he could get any relief at all. But though *Kelly's* case[11] was criticized, it was treated as binding on the Court of Appeal. In *National Society of General and Municipal Workers* v. *Gillian*[12] it was said that a registered trade union is a distinct legal person separate from the individuals comprising it. That is right. It is a juridical person and contracts with its members in terms of its rules. *London Association for the Protection of Trade* v. *Greenlands Ltd.*[13] deals with the question of the authority of officers of an unincorporated body.

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[3] [1901] A.C. 426, 442.

[4] [1905] A.C. 256; 21 T.L.R. 431.

[5] [1910] A.C. 87, 93, 102; 26 T.L.R. 177.

[6] [1911] 1 Ch. 540; 27 T.L.R. 289.

[7] [1922] 2 A.C. 440; 38 T.L.R. 879.

[8] [1912] A.C. 421; 28 T.L.R. 276.

[9] 84 L.J.K.B. 2236; 31 T.L.R. 632.

[10] [1921] 2 K.B. 694, 697, 702, 709–710; sub nom. *R.* v. *Parsons*, 37 T.L.R. 546.

[11] 84 L.J.K.B. 2236.

[12] [1945] 2 All E.R. 593, 596, 598, 600, 601, 602; (C.A.) [1946] K.B. 81, 84, 87–88; 62 T.L.R. 46.

The relevant statutes are set out in Citrine on Trade Union Law in Appendix I: Trade Union Act, 1871; Trade Union Act (1871) Amendment Act, 1876; Trade Disputes Act, 1906; Trade Union Act, 1913; Trade Disputes and Trade Unions Act (Northern Ireland) Act, 1927 (similar to the Trade Disputes and Trade Unions Act, 1927, repealed in 1946); Societies (Miscellaneous Provisions) Act, 1940. In particular sections 15 and 16 of the Act of 1871 indicate that a registered trade union has a distinct legal personality since penalties are imposed on it and an offender must be either a natural or an artificial person.

In the Court of Appeal[14] it was conceded that section 4 of the Trade Union Act, 1871, does not prohibit a claim for damages for wrongful expulsion.

[*Lindner Q.C.* It is desired to keep that point open. One cannot concede a point of jurisdiction.]

It is wrong to consider an action against a trade union as a representative action against the members. It is immaterial whether the claim is for damages or a declaration; if the plaintiff were on both sides of the fence the action would be bound to fail.

Assuming that the officers of the trade union are the plaintiff's agents, if he is treated unlawfully by them it cannot be said that they are acting on his behalf in so treating him. As to the other members, the mere association of persons together does not per se make one the agent of the other. Accordingly, the plaintiff was not debarred from claiming damages. If a trade union is a legal entity for any purpose there is nothing to hinder it from entering into a contract with an incoming member. There is nothing in any Act of Parliament or any rule of law to prevent this. In the natural course of events that is what happens. An analogy is found in limited companies.

Mr. Bonsor, in joining the union, entered into a contract of membership with the union and not with his fellow members as distinct from the union. The union, being registered, is a legal entity or quasi-corporation capable of suing in respect of wrongs done to itself and of being sued for breaches of the contract of membership by any of its members, subject to statutory limitations. The secretary of the union, in wrongfully expelling or excluding Mr. Bonsor, was acting on behalf of the union and not on behalf of all the individual members including Mr. Bonsor. From first to last the union adopted the attitude that Mr. Bonsor was rightly expelled and accordingly it could not say that the secretary was not its agent for that purpose.

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[13] [1916] 2 A.C. 15, 38; 32 T.L.R. 281.

[14] [1954] Ch. 479, 488.

The appellant's submission does not result in any personal obligation on the members. The obligation is limited to the union funds. The case stands or falls on the point whether or not a registered trade union is a legal entity. A wrongfully expelled member of an unregistered trade union is in the same position as a wrongfully expelled member of a club.

It is only if a trade union is treated as a legal entity that the authorities are consistent. It would be remarkable if the truth of the matter were that the contract was with an agglomeration of the members; this has never yet been previously recognized. A registered trade union is a legal entity, though not a corporation. It is a quasi-corporation.

This was a registered trade union. If it were unregistered the case would fail, for then the union would have no special rights given it by the statute. It is because of its special privileges given by statute that a registered trade union has its special quality. There are certain limitations on the powers of trade unions, but the expulsion of a member is intra vires provided it acts properly in the matter.

Lindner Q.C. and *Schapiro* for the respondent union. It is not intended to take any point of jurisdiction derived from section 4 of the Trade Union Act, 1871, which does not apply to these proceedings.

The appellant's claim is based on a breach of a contract alleged to be between the union as one party and Mr. Bonsor as the other, and the contention is that so far as the union was concerned it was clothed with a sufficient legal personality to enter into such a contract of membership. It is said that by virtue of registration under the Act of 1871 it acquired a legal personality and status which enabled it to enter into the contract. The following questions arise: (1) Assuming that a trade union is neither a corporation nor a legal person by virtue of registration, can it enter into a valid contract of membership with a member? (2) Can it be sued in damages for a breach of contract? (3) Was *Kelly's* case [15] rightly decided?

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[15] 84 L.J.K.B. 2236.

It is first necessary to see what documents in fact constitute the contract and in particular whether they purport to be between Mr. Bonsor of the one part and the union as a legal entity on the other. Then it is necessary to look at the Acts of 1871, 1906 and 1913 to see whether the union is competent to enter into the contract as a party to it.

With regard to the documents, the rules of the union constitute the basis of association of the persons associated together as its members. There is nothing in those rules to show that, however they become binding, the contract is between the union as a legal entity and a particular person becoming a member. The rules are quite neutral and merely form a code of association. The way Mr. Bonsor became bound by the rules and the code of association was by making application on the prescribed form, by election or a decision of a majority of the executive committee or branch committee, by communication of that decision to the national office and by granting him a membership card. The point of time at which he was deemed to have become a member is not material. The form of application was addressed to the secretary of the branch and not to the union itself. It could equally well be an application to become a member either of a union as a legal entity or of a voluntary association. The language of the documents does not assist the appellant's contention.

In law, the respondents submit, a registered trade union is an association of members with no legal entity of its own distinct from its members, and a member cannot sue himself and recover damages for a wrong committed by his own agent. The question to be decided is whether there is such a legal entity as a trade union at common law or under the Act of 1871 or the Act of 1906 or the Act of 1913 or as a result of all or any of them or of the judicial interpretation of them in the House of Lords.

There can be no doubt that a trade union is not a corporation, whether at common law or under the Acts judicially interpreted. So far as the common law was concerned, the whole point of the legislation (the result of a Royal Commission in 1867) was to remedy the disabilities under which trade unions laboured through not being legal personae of any description at all or legal entities. The form of this legislation, compared with the legislation relating to friendly societies, made it clear that incorporation was not intended. Neither at common law nor under the Acts was any lesser entity than a corporation created in law.

It was contended for the appellant that a trade union is something less than a corporation but nevertheless a legal entity. In this case the legislature deliberately refrained from creating trade unions corporations and in law it did not do so. The reason was to preclude trade unions from having anything in the nature of a separate legal existence distinct from their whole membership. It would be strange if by judicial interpretation it were found that a legal entity had been established without any defined rights or powers. The expression "quasi-corporation" has about as much precision as "what not." The law knows only as legal entities the corporation and the individual. There is no such entity as a quasi-corporation. A legal personality is a creation of the law and one must look at the method of creation to see whether a corporation has in fact been created. There is no case of a legal entity being created in any other way, or of a legal personality being conferred on any association without any definition of powers, duties and attributes. If a trade union were to be held to be a legal person it would be essential to have such a definition. By the very use of the expression "quasi" a legal personality as such is precluded.

For the background of the matter, see Lloyd on the Law of Unincorporated Associations, pp. 2, 4–5, 6 and 15. Against the background of the general principles there expressed the Act of 1871 must be considered. If the appellant is to establish something between a natural person and a corporation, it can only be done under the relevant statutes.

It is submitted that: (1) there is not a single word in the Act of 1871 which indicates that a trade union is to be a corporation or a body or a legal entity; (2) the pattern of the Act is such as to preclude that idea; (3) had the legislature intended that, whether registered or not, trade unions were to be legal entities or quasi-corporations, it would have said so; (4) the whole purpose of not incorporating trade unions was to prevent their members from treating them as legal entities.

One purpose of the legislation was to confirm the legality of trade unions and to preclude interference with their internal affairs: see Hedges and Winterbottom's Legal History of Trade Unionism, p. 65, and Lloyd on the Law of Unincorporated Associations, p. 85. This appears also from section 4 of the Act of 1871 read against the background of sections 2 and 3. Its language is entirely inconsistent with incorporation. Since by that section a trade union cannot recover from any member by legal action the subscriptions from which its funds are derived, it cannot have been intended to enable a member to recover damages out of those funds. The section indicates an agreement between the members as such and that precludes the idea of an agreement between the members and the union as a legal entity. Subsection (1) indicates the contrary. See also section 5 of the Act and paragraph 2 of Schedule I and *In re Amos* [16] and *Rigby* v. *Connol.*[17]

If a suit against a registered trade union in its own name is regarded as merely a procedural device substituted for a representative action, it is, strictly speaking, unnecessary to adjudicate on whether a union is a corporation or a legal entity less than a corporation.

All the judges in *Taff Vale Railway Co.* v. *Amalgamated Society of Railway Servants* [18] had in mind the distinction between a proceeding against a union by a third party outside the union and one by a member. Farwell J. was limiting his observations to the former.

As to the question of the liability of the members, if in an action by a third party against a union its funds were insufficient to meet the damages awarded, it is not necessary to commit oneself to any view, but the better view would seem to be that the individual members would be liable down to their last penny piece, provided that in committing the tort in question, say in the course of a strike, the officers of the union were acting within the scope of their authority: see *Taff Vale Railway Co.* case.[19] In the cases in which a trade union has been sued the effect has been that the judgment was against every individual member, but operated on the funds gathered together by the members. In the case of a club the liability of the members for the commitments of the secretary depends on his authority. As to the limits of the liability of the trustees of a union's property, see sections 8 and 9 of the Act of 1871, and Citrine on Trade Union Law, p. 231. See the *Taff Vale Railway Co.* case [20] as to a union's liability to be sued.

When the legislature intends to grant a body of persons a legal personality it does so explicitly as in the case of industrial provident societies, friendly societies and building societies. There is nothing in the Act of 1876, any more than in the Act of 1871, to suggest that the essential character of a trade union is that of a legal entity. The nature of the society was not altered by the statutes or by registration thereunder. The definition in section 16 of the Act of 1876 includes both registered and unregistered trade unions. Not a single word in the Act of 1906 reflects any decision by the legislature to alter the nature of a trade union. It deals with a problem arising under the *Taff Vale Railway Co.* case [21] and contemplates something in the nature of a representative action. *Amalgamated Society of Railway Servants* v. *Osborne* [22] was followed by the Act of 1913, which contains nothing telling against the respondents.

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[16] [1891] 3 Ch. 159; 7 T.L.R. 559.

[17] (1880) 14 Ch.D. 482.

[18] [1901] A.C. 426, 427, 430–431.

[19] Ibid. 438.

[20] Ibid. 434–435, 438, 439–440, 443.

Then came *Kelly's* case,[23] which was rightly decided, having regard to the existing legislation and the authorities, on both points, viz., (1) that a trade union is not a legal entity, and (2) that a member cannot be awarded damages against a union for wrongful expulsion. The objects of the legislation were (1) to remove from trade unions criminal liability resting on the law of restraint of trade, and (2) to free them from certain civil disabilities. It was not intended to govern the contract of membership, however formed, nor to provide remedies for breach of it. The contract of membership was to be left to the members. Even if a trade union is to be regarded as a legal entity for some purposes, there is no indication that relief is given in respect of the contract of membership: see *Rigby* v. *Connol* [24] and *Russell* v. *Amalgamated Society of Carpenters and Joiners.*[25]

However the contract of membership is constituted, it rests on the basis of the rules of the society. A court will not award damages for breach of a rule not to work for less than the rates of pay laid down in the rules. Nor will any court make an order compelling a member to participate in a strike under the rules. These are matters for the domestic forum. To enforce them might be said to be in restraint of trade. Similarly the court would not enforce rules laying down the limits of hours of work. It is remarkable that in the Act of 1876 there is nothing dealing with the rights of members, in contrast with the Friendly Societies Acts and the Companies Acts, which deal with the rights of members and shareholders.

Much reliance is placed on section 2 (2) of the Trade Disputes and Trade Unions Act, 1927, which is contemplating the position where a member of a union has refused to participate in an illegal strike. The legislature does not confine his remedy to an injunction but gives him a right to damages. This would be unnecessary if under the existing law a member could get damages for wrongful expulsion. The subsection also indicates that the damages are relief in lieu of an injunction and not in addition to it.

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[21] [1901] A.C. 426.

[22] [1910] A.C. 87.

[23] 84 L.J.K.B. 2236.

[24] 14 Ch.D. 482.

[25] [1912] A.C. 421.

The Act of 1871 does not deal with the contract of membership. The history of trade union legislation centres round the doctrine of restraint of trade and the difficulties arising from it. The Acts and the cases do not assist a member wrongfully expelled to get damages. *Kelly's* case [26] was rightly decided. If the union is only the agglomeration of its members, the only way the members can act is by agents. This is so whether the union is registered or not. The agents who act on behalf of the union are the agents of all the members. Thus, if a breach of a rule by one of the union's officers results in the wrongful expulsion of a member, that act is the act of the common agent of all the members, and it is as much the act of the aggrieved member as of the other members. The appointment of an agent is a joint appointment. As to the case of partnerships, see Lindley on Partnerships, 11th ed., p. 343, and R.S.C., Ord. 48, r. 10. If the court were to act on the analogy of partnership it would order a dissolution, but that would be wholly unreal in the case of a trade union. That is why the courts have shrunk from giving damages in such a case as this.

For wrongful expulsion a member of a voluntary society has a cause of action; the basis of the jurisdiction of the court to intervene is that he has been wrongfully deprived of a proprietary right. It is akin to a wrongful deprivation of an equitable right: see Wertheimer on Clubs, 5th ed., c. 4, pp. 113 et seq., and Halsbury's Laws of England, 3rd ed., vol. V, p. 264, para. 621. On this basis the plaintiff may get a declaration and an injunction. But, for the reasons given by Bankes L.J. in *Kelly's* case,[27] he cannot succeed in a claim for damages. There is no logical objection to applying his reasoning here, once one accepts the analogy of a voluntary society. X is expelled by the act of the agents of a trade union. Who are they? The only possible answer is that they are the collective agents of all the members. This deprives X of all right to damages. In the unusual case of all the members except X voting to expel him he would have a remedy. The position of the agents of a voluntary society can

[26] 84 L.J.K.B. 2236.

[27] Ibid. 2239.

only be explained on the footing of collective responsibility: see *Lee* v. *Showmen's Guild of Great Britain.*[28]

It has been suggested that there is an inconsistency in granting a declaration and an injunction and yet not permitting a remedy in damages. But the injunction is not in lieu of damages; it is ancillary to a declaration of right of the expelled member; it is usually adequate to protect his rights. The respondents' view is supported by *Amalgamated Society of Carpenters, Cabinet Makers and Joiners* v. *Braithwaite.*[29]

In law a registered trade union is an association of members with no legal entity of its own distinct from its members, one of whom cannot sue and recover damages for a wrong committed by its own agent. Further, the beneficiaries of a fund of a registered trade union are its members collectively and severally, and an individual member cannot recover damages against himself.

To allow this appeal would be to upset settled law. If damages were awarded here, it would be impossible to tell where the thing would stop. [*Abbott* v. *Sullivan* [30] was also referred to.]

Schapiro following. It may be that in the *Taff Vale Railway Co.'s* case [31] Lord Lindley took the view that the legislature intended that a third party damaged by the act of a trade union's agents should be able to recover damages up to the amount of the union's funds and that quoad third parties a union therefore had some sort of personality. But only Lord Brampton went so far as to say that a trade union was a legal entity. Lord Lindley said the reverse. That case was to a large extent made obsolete by the Act of 1906. After the House of Lords had interpreted the old Act the legislature altered the law. Similarly the Act of 1913 rendered the first *Osborne* case [32] a matter of history and that case cannot help the House now.

On the question whether the action is a representative action against all the members, if a trade union is not registered, it is not that the action would fail; it would never start, since, though the plaintiff might sue several individuals, he would never get a representation order. The suggestion that *Kelly's* case [33] was ill-founded because it seems to have accepted an erroneous statement of the law by Lord Macnaghten in *Russell's* case [34] is not justified: see *per* Evershed M.R. in the Court of Appeal [35] in the

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[28] [1952] 2 K.B. 329; [1952] 1 T.L.R. 1115; [1952] 1 All E.R. 1175.

[29] [1922] 2 A.C. 440.

[30] [1952] 1 Q.B. 189, 219; [1952] 1 T.L.R. 133; [1952] 1 All E.R. 226.

[31] [1901] A.C. 426.

[32] [1910] A.C. 87.

[33] 84 L.J.K.B. 2236.

[34] [1912] A.C. 421.

[35] [1954] Ch. 479, 496; [1954] 1 All E.R. 822.

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present case. The reasoning of Bankes L.J. was not thereby invalidated. Nor is any question of a representation action relevant to the present problem. Bankes L.J. was proceeding on a basis different from that of the *Taff Vale Railway* case.[36]

It was argued for the appellants that if once a member could be granted an injunction and costs, it was inconsistent not to grant him damages. Since *Yorkshire Miners' Association* v. *Howden*[37] it can be said that the grant of an injunction in a case of wrongful expulsion does not amount to specific performance of the contract. *Rigby* v. *Connol*[38] had been followed until this decision, which laid the foundation of an action for an injunction. The principle has been accepted in numerous cases. When the courts grant a declaration and an injunction they are not enforcing the contract. The injunction is ancillary to the declaration sought. In such cases the courts go outside the narrow limits of the contract of the members. If they did not, it would be impossible to apply, as they do, the principles of natural justice. The foundation of the matter is the contract, but the court in its supervisory jurisdiction is concerned to see that as between the parties it is observed in the spirit of natural justice. When a contract is silent on the principles of natural justice the court will nevertheless imply them. This goes beyond the contract. The *Taff Vale Railway Co.'s* case[39] added nothing to the rights of members, so far as action is concerned. The claim by a member for a declaration is a matter of interest to all the members, including himself. He is seeking to have the rules interpreted.

As to costs in such cases, these are, no doubt, paid out of union funds. No parallel can be drawn between awarding costs to be so paid and awarding damages. The essence of an award of damages would be that the plaintiff was claiming compensation out of the union funds for a wrong done to him. The essence of an award of costs is to decide where the burden of litigation is to fall. In a probate action the court may decide that the costs are to be paid out of the estate, but that does not amount to administering the estate. So it is right where there is a dispute between a member and the union officials as to the interpretation of the rules that, if he is correct, he should not bear the burden of the costs.

As to the object of seeking a declaration, see *Braithwaite's* case.[40] There is a distinction between a declaration with an

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[36] [1901] A.C. 426.
[37] [1905] A.C. 256.
[38] 14 Ch.D. 482.
[39] [1901] A.C. 426.
[40] [1922] 2 A.C. 440, 448, 449–50.

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ancillary injunction and specific performance of a contract: see *Howden's* case.[41] In the present case the plaintiff originally asked only for a declaration and an ancillary injunction with no vestige of a claim for specific performance. It was only on amendment that a claim for damages was added. There is a great difference between construing the rules of the union and granting compensation for breach of contract. It is one thing to come to the court and ask who is the union's agent and who has acted wrongfully on the interpretation of the rules, and quite another thing to come to the court claiming damages for the wrongful act of one who is both the union's agent and the plaintiff's agent. In the former case the plaintiff does not have to show that the act of the agent in interpreting the rules is not his own act; in the latter case he does: see *Braithwaite's* case.[42] As to *Kelly's* case,[43] see *per* Denning L.J. in the Court of Appeal in the present case.[44] Whatever the facts in *Kelly's* case,[45] it is not possible to say that here there was nothing else but the mere fact of association. At every stage the officers were elected and controlled by the members. Striking members off the roll is one of the duties of the secretary. In so doing he is acting as the agent of the member he strikes off, as well as of the other members. It is an example of the artificiality of unincorporated associations.

If damages were granted in such a case as this the just would suffer with the unjust among the members, the majority of whom know nothing about these matters. As a result their subscriptions might have to be increased because of the depletion of the union's funds. It might also make relationship between unions and their members impossible if they had to fear an action for damages every time a member was expelled. In the present case several years have passed since the wrongful act and many of the present members were not members then. An award of damages would affect perfectly innocent members.

Lester in reply. In English law any thing (using the word "thing" in its widest sense) which the law regards as capable of rights and duties is an entity, a separate thing: see Salmond on Jurisprudence, 10th ed., p. 318. The difficulty put forward by the respondents is that because the Act of 1871 quite deliberately refrained from giving trade unions in terms a corporate quality, it is said that it could not properly be construed as giving them a separate legal entity. It is conceded that nothing in the Act expressly incorporates them, but it clearly gives them attributes which can only exist in a legal entity, since they are in terms given powers and subjected to duties. If one finds the attributes of a legal entity clearly given in a statute a legal entity has been created by it. There are normal legal persons (viz., natural persons, human beings) and non-natural legal persons. If the latter are given powers and subjected to duties it is not necessary to find any express incorporation: see *Cotter* v. *National Union of Seamen*,[46] in which the law was correctly applied. The rule in *Foss* v. *Harbottle*[47] is inconsistent with the case of a mere voluntary society. The Act of 1871 confers rights and imposes duties on trade unions. Section 4 (1) is not against the appellant. The actions which it prohibits are actions against a trade union. But in the section it is accepted that there can be an agreement between a member and the union. Section 7 supports the appellant, as does also section 8 in the words "benefit of such trade "union and the members thereof," which show that the union is more than the association of the members. Sections 15 and 16 impute liability to the union as such. The first *Osborne* case[48] would not have come before the House of Lords if the union had only been the agglomeration of the members. After the Act of 1913 a union was just as much an entity as before. The special right to damages given to members by the Act of 1927 does not necessarily mean that the legislature did not recognize the member's right to recover damages in the ordinary case of breach of contract. Section 6 of the Societies (Miscellaneous Provisions) Act, 1940, is quite inconsistent with the view that a trade union is merely a voluntary association. In a voluntary association it is only by agreement of the members that the subscription can be raised so as to bind all members, unless there is any provision in the rules for such an alteration: see *Harington* v. *Sendall*.[49]

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[41] [1905] A.C. 256.

[42] [1922] 2 A.C. 440, 469–70.

[43] 84 L.J.K.B. 2236.

[44] [1954] Ch. 479, 513.

[45] 84 L.J.K.B. 2236.

Kelly's case[50] was wrongly decided. It is wrong to base the judgment on the footing that the plaintiff could not recover because he was suing himself among others. If a trade union is a legal entity that disposes of all the reasons in *Kelly's* case.[50]

As to the question of agency, one should not confuse the authority and position of the secretary of the union in relation to third parties on the one hand and members on the other. The authority given to the secretary is to act according to the rules.

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[46] [1929] 2 Ch. 58, 65, 71, 102, 108, 110; 45 T.L.R. 352.

[47] (1843) 2 Hare 461.

[48] [1910] A.C. 87.

[49] [1903] 1 Ch. 921.

[50] 84 L.J.K.B. 2236.

If in relation to a member the secretary acts contrary to the rules the question arises who gave him authority to act thus. The plaintiff here did not give the secretary authority to expel him. The expulsion was contrary to the rules and there was no such implied authority. The union adopted the act of the secretary. In the very act of purporting to expel the plaintiff the secretary committed such a breach of a fundamental term of the agency as to bring it to an end.

Lindner Q.C. In *Cotter's* case [51] the court went beyond what was necessary for its decision. In substance it was only following the *Taff Vale Railway Co.'s* case [52] and the first *Osborne* case.[53] It was not necessary to hold that a trade union was a legal entity; it was only necessary to show that it was a body having by statute the right to sue in its own name.

Their Lordships took time for consideration.

Nov. 7. Lord Morton of Henryton stated the facts and continued: My Lords, the Master of the Rolls and Jenkins L.J. were of opinion, rightly, in my view, that *Kelly* v. *National Society of Operative Printers' Assistants* [1] was binding on the Court of Appeal, but Denning L.J. felt himself entitled to disregard that case and delivered a judgment in favour of Mr. Bonsor, which I have found of great assistance. It is the dismissal of the cross-appeal which gives rise to the appeal now before your Lordships' House.

Mr. Bonsor died on March 4, 1954, and the present appellant is his widow and legal personal representative. On August 5, 1954, it was ordered that these proceedings should be carried on between the present appellant and the respondent union.

It is convenient to turn at once to *Kelly's* case.[1] The plaintiff was a printer's assistant, and the defendant was a trade union registered under the Trade Union Acts. The plaintiff claimed a declaration that a resolution expelling him from membership of the union was ultra vires and void, an injunction restraining the union from enforcing the said resolution, and damages. The case was first heard in the county court and there the plaintiff obtained a declaration and injunction as asked and £68 damages for loss of employment owing to his expulsion from the union. It is unnecessary for the present purpose to refer to the proceedings on appeal in the Divisional Court, but when the case reached the Court of Appeal that court upheld the grant of the declaration and injunction but held that the plaintiff could not recover any damages. The union was ordered to pay the costs of the appeal.

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[51] [1929] 2 Ch. 58.

[52] [1901] A.C. 426.

[53] [1910] A.C. 87.

[1] (1915) 84 L.J.K.B. 2236; 31 T.L.R. 632.

My Lords, I can see no ground upon which *Kelly's* case [1] can be distinguished from the present case, but I am of opinion that *Kelly's* case [1] was wrongly decided in so far as the plaintiff's claim for damages was rejected.

I think the basis of the decision appears most clearly in the following passage from the judgment of Phillimore L.J.[2]: "Damages for tort cannot be given since the Trade Disputes "Act, 1906 (6 Edw. 7, c. 47). These damages can only "be supported as damages for breach of contract. With "whom did the plaintiff contract? Not, I think, with the "trade union, which, as Lord Macnaghten says in *Russell* v. "*Amalgamated Society of Carpenters and Joiners*,[3] is merely "an unincorporated society of individuals. I think that the "plaintiff contracted with each and every of the members, "and if anybody has broken any contract with him, it is each "and every member. Further, the officers of the society are "agents for him quite as much as for the other members, and "if he sues the trade union for what it has done, he is suing "himself among others. I am not sure whether, according to "the very loose form in which the judgment is drawn up, there "is any judgment against the trade union as such. But if "there is, it is open to these objections. I also think that there "can be no charge upon the funds of the society for any breach "of contract. . . ." My Lords, in my opinion the action in *Kelly's* case [4] was an action by a member against his union as an entity recognized by the law and distinct from the individual members thereof, for breach of a contract between the plaintiff and his union. If this is so, the foundation for the refusal to award damages is gone.

I base the view which I have just expressed upon a line of authorities of which the first is the well-known case of *Taff Vale Railway Co.* v. *Amalgamated Society of Railway Servants*.[5] In that case it was held by this House that a trade union registered under the Trade Union Acts, 1871 and 1876, could be sued in tort for the wrongful conduct of its servants in the course of a strike. I find it unnecessary to set out the relevant provisions of these Acts, since they are sufficiently summarized for the present purpose in passages which I am about to quote from the judgment of Farwell J. in the *Taff Vale* case.[5] That learned judge said[6]: "The defendant society have taken out "a summons to strike out their name as defendants, on "the ground that they are neither a corporation nor an "individual, and cannot be sued in a quasi-corporate or any "other capacity. . . . Now it is undoubtedly true that a "trade union is neither a corporation nor an individual nor a "partnership between a number of individuals; but this does "not by any means conclude the case." After referring to section 16 of the Trade Union Act (1871) Amendment Act, 1876, and to an argument advanced on behalf of the defendant, the learned judge continued[7]: "The questions that I have to consider are what, according to the true construction of the Trade "Union Acts, has the legislature enabled the trade unions to "do, and what, if any, liability does a trade union incur for "wrongs done to others in the exercise of its authorized powers? "The Acts commence by legalizing the usual trade union contracts, and proceed to establish a registry of trade unions, give "to each trade union an exclusive right to the name in which it "is registered, authorize it through the medium of trustees to "own a limited amount of real estate and unlimited personal "estate 'for the use and benefit of such trade union and the "'members thereof'; provide that it shall have officers and "treasurers, and render them liable to account; require that "annual returns be made to the registry of the assets and "liabilities and receipts and expenditure of the society; provide "that it shall have rules and a registered office, imposing a "penalty on the trade union for non-compliance; and permit it "to amalgamate with other trade unions, and to be wound up. "The funds of the society are appropriated to the purposes of "the society, and their misappropriation can be restrained by "injunction: *Wolfe* v. *Matthews*[8]; and on a winding-up, such "funds are distributed amongst the members in accordance with "the rules of the Society: *Strick* v. *Swansea Tin-plate Co.*[9] "Further, the Act of 1871 contains a schedule of matters which

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[1] 84 L.J.K.B. 2236.

[2] Ibid. 2238.

[3] [1912] A.C. 421, 429; 28 T.L.R. 276.

[4] 84 L.J.K.B. 2236.

[5] [1901] A.C. 426; 17 T.L.R. 698.

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[5] [1901] A.C. 426.
[6] [1901] A.C. 426, 427.
[7] Ibid. 427–8.
[8] (1882) 21 Ch.D. 194.
[9] (1887) 36 Ch.D. 558.

"must be provided for by the rules." After referring to observations of Sir George Jessel in *Rigby* v. *Connol*,[10] in regard to the limitations on legal proceedings imposed by section 4 of the Trade Union Act, 1871, the learned judge continued[11]: "But "these limitations merely restrict the actual enforcement of "trade union contracts by action or suit, and do not affect the "question of the status of the association to which such members belong. Now, although a corporation and an individual "or individuals may be the only entity known to the common "law who can sue or be sued, it is competent to the legislature "to give to an association of individuals which is neither a "corporation nor a partnership nor an individual a capacity for "owning property and acting by agents, and such capacity in "the absence of express enactment to the contrary involves the "necessary correlative of liability to the extent of such property "for the acts and defaults of such agents. It is beside the "mark to say of such an association that it is unknown to the "common law. The legislature has legalized it, and it must be "dealt with by the courts according to the intention of the "legislature."

The Court of Appeal set aside the orders made by Farwell J., but this House was unanimous in restoring them, and the judgment of Farwell J. was accepted in toto by the Lord Chancellor (the Earl of Halsbury), Lord Shand and Lord Brampton.

Lord Halsbury said[12]: "My Lords, in this case I am content to adopt the judgment of Farwell J., with which I entirely "concur; and I cannot find any satisfactory answer to that judgment in the judgment of the Court of Appeal which overruled it. If the legislature has created a thing which can "own property, which can employ servants, and which can "inflict injury, it must be taken, I think, to have impliedly "given the power to make it suable in a court of law for injuries "purposely done by its authority and procurement."

Lord Shand referred[13] to "the admirable judgment of "Farwell J., in whose reasoning I entirely agree."

Lord Brampton said[14]: "I entirely concur in the judgment "and words of the Lord Chancellor in adopting the judgment of "Farwell J.," and added[15] that the defendant society was a "legal entity . . . though not perhaps in the strict sense a "corporation."

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[10] (1880) 14 Ch.D. 482, 489–90.

[11] [1901] A.C. 426, 429.

[12] Ibid. 436.

[13] Ibid. 440.

[14] Ibid. 441.

[15] Ibid. 442.

Lord Macnaghten said[16]: "Although I should be well content to adopt the judgment of Farwell J. and the reasons he has given, I will venture to add a few words of my own, partly out of respect for the Master of the Rolls, from whose opinion I never dissent without the greatest hesitation, and partly in deference to the argument of counsel, which, before your lordships, has ranged over a wider field, and on the part of the respondents has, I think, assumed a somewhat bolder tone than in the court below." In the course of his speech the noble and learned Lord made some observations which would seem to indicate a view that the action was a representative one, wherein all the members of the union were sued in the registered name of the union. I think that these observations were obiter dicta, but, of course, I accord them the greatest respect. Nevertheless, I have formed the conclusion that they cannot be reconciled with the views of the majority of this House, expressed in the words of Farwell J. which I have just read. It seems to me that the majority of this House regarded the "entity" or "thing" which was being sued as something separate and distinct in law from the individual members of the society. Moreover, the opposite view gives rise to great difficulties. For instance, the membership of a trade union is constantly changing, as old members die and new members come in. If the suit is to be regarded as having been brought against the individual members, it must have been brought against those who were members at the time when the writ was issued. Yet some of these persons may not have been members at the time when the tort was committed, and the tort cannot therefore have been committed by their agents.

Lord Lindley's speech contains passages which may be construed as expressing the view that all the members of the union were being sued in the name of the union, but he concluded his speech with these words[17]: "Your Lordships have not now to consider how a judgment or order against a trade union in its registered name can be enforced. I see no difficulty about this; but, to avoid misconception, I will add that if a judgment or order in that form is for the payment of money it can, in my opinion, only be enforced against the property of the trade union, and that to reach such property it may be found necessary to sue the trustees."

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[16] [1901] A.C. 426, 436–437.

[17] Ibid. 445.

If the action had been against all the members of the union, it is difficult to see why an order made in the action for the payment of money could only be enforced against the property of the union. Surely, on the hypothesis just stated, each member of the union would be liable in damages for the wrong done. The proceedings before Farwell J. and in this House were interlocutory, but (as Denning L.J. points out) the case subsequently went for trial and a verdict was found for the plaintiffs against the union. The damages were assessed at £23,000 and that sum was paid out of the funds of the union.

My Lords, in my view the *Taff Vale* case [18] goes far to decide the question now before your Lordships' House. It may be that Lords Macnaghten and Lindley thought that an action against the union was an action against all the individual members—indeed, that view was expressed again by Lord Macnaghten in *Russell's* case [19] and by Lord Lindley in *Yorkshire Miners' Association* v. *Howden* [20]—but I am satisfied that it has never been more than a minority view, inconsistent with the relevant authorities from the *Taff Vale* case [21] onwards, with the solitary exception of *Kelly's* case.[22]

The *Taff Vale* case [23] differs from the present case only in two respects: (1) The plaintiff was not a member of the defendant union, and (2) the action was based on tort, not on contract. Prima facie, I should not have thought that these were vital differences, and this view is borne out by the cases to which I shall shortly refer.

I need hardly say that I have not overlooked the provisions of section 4 (1) of the Trade Disputes Act, 1906, which enacted that: "An action against a trade union . . . in respect of any "tortious act alleged to have been committed by or on behalf "of the trade union, shall not be entertained by any court." That section, however, had no operation as regards, for instance, a breach of contract, and it left undisturbed the principles laid down in the *Taff Vale* case.[23]

I now pass to the case of *Yorkshire Miners' Association* v. *Howden*.[24] The decision in that case turned on the construction of section 4 of the Trade Union Act, 1871, but its importance for the present purpose lies in the fact that a member of a registered trade union got judgment against his union (and also against some of its officials and its trustees) for an injunction restraining a misapplication of the union's funds. In none of the speeches in this House was it suggested that a member could not bring an action against his union. In *Amalgamated Society of Railway Servants* v. *Osborne* [25] this House granted an injunction, at the suit of a member of a trade union, restraining the union and its trustees from applying the funds of the union for procuring or supporting parliamentary representation. This particular application of its funds by the union was held to be ultra vires at the suit of one of its members, and Lord Atkinson said [26]: "It is clear, in my "view, that they" (i.e., trade unions) "are, when registered, "quasi-corporations, resembling much more closely railway com-"panies incorporated by statute than voluntary associations of "individuals merely bound together by contract or agreement, "express or implied." In *Osborne* v. *Amalgamated Society of Railway Servants* [27] ("the second Osborne case") Mr. Osborne, who had been expelled from his union, brought an action against the union and its trustees to obtain reinstatement as a member on the ground that his expulsion was ultra vires and void. It was held by the Court of Appeal that the action was maintainable, and that the jurisdiction of the court to entertain it was not ousted by section 4 of the Trade Union Act, 1871. This case carries the matter a stage further, since the plaintiff was asserting his own rights as a member against his union. The second *Osborne* case [27] was approved by this House in *Amalgamated Society of Carpenters, Cabinet Makers and Joiners* v. *Braithwaite*,[28] and the House held that Braithwaite and the other plaintiffs could obtain an injunction against their respective unions to restrain a threatened expulsion.

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[18] [1901] A.C. 426.

[19] [1912] A.C. 421, 429.

[20] [1905] A.C. 256, 280; 21 T.L.R. 431.

[21] [1901] A.C. 426.

[22] 84 L.J.K.B. 2236.

[23] [1901] A.C. 426.

[24] [1905] A.C. 256.

My Lords, it seems to me that *Braithwaite's* case [28] is really decisive of the present case. The action was based upon a breach of a contract between the plaintiffs and their respective unions, and a threatened breach of that contract was restrained by injunction. If the breach had actually taken place I see no reason why damages should have been refused.

In the meantime, *Kelly's* case [29] had been criticized by the Court of Appeal in *Rex* v. *Cheshire County Court Judge*.[30] Lord

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[25] [1910] A.C. 87; 26 T.L.R. 177.

[26] [1910] A.C. 87, 102.

[27] [1911] 1 Ch. 540; 27 T.L.R. 289.

[28] [1922] 2 A.C. 440; 38 T.L.R. 879.

[29] 84 L.J.K.B. 2236.

[30] [1921] 2 K.B. 694; sub nom. *R.* v. *Parsons*, 37 T.L.R. 546.

Sterndale M.R.[31] described it as "a decision of this court, which "binds us till the House of Lords reverses it." Scrutton L.J.[32] made some trenchant comments upon it, and Younger L.J. made it plain[33] that he would view its reversal with satisfaction. Finally, in the case of *National Union of General and Municipal Workers* v. *Gillian*,[34] the Court of Appeal, affirming Birkett J., held that a trade union can sue for a libel on itself, and Uthwatt J. said[35]: "That decision" (i.e., the decision in the *Taff Vale* case[36]) "involves, to my mind, that a registered trade union is "recognized by the law as a body distinct from the individuals "who from time to time compose it." With that observation I agree, and all the cases to which I have referred, with the solitary exception of *Kelly's* case,[37] lead me to the following conclusions:—

(1) The respondent union, though it is not an incorporated body, is capable of entering into contracts and of being sued as a legal entity, distinct from its individual members.

(2) When Mr. Bonsor applied to join the respondent union, and his application was accepted, a contract came into existence between Mr. Bonsor and the respondent, whereby Mr. Bonsor agreed to abide by the rules of the respondent union, and the union impliedly agreed that Mr. Bonsor would not be excluded by the union or its officers otherwise than in accordance with the rules.

(3) The respondent union broke this contract, by wrongfully expelling Mr. Bonsor, and Mr. Bonsor sued the union as a legal entity. He did not sue either all the members of the union at the date of the writ other than himself, many of whom must have joined since the breach of contract, or all the members of the union including himself.

(4) There is no reason in law why Mr. Bonsor should not be granted against the respondent all the remedies appropriate to a breach of contract.

(5) The Court of Appeal in *Kelly's* case[37] should have awarded damages to the plaintiff.

I have not embarked upon a fresh and detailed examination of the trade union legislation, so often examined by this House in the past, for it seems to me that the decisions of this House to which I have referred have settled the law on the lines set out in the conclusions just stated.

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[31] [1921] 2 K.B. 694, 702.

[32] Ibid. 709–10.

[33] Ibid. 712.

[34] [1946] K.B. 81; 62 T.L.R. 46; [1945] 2 All E.R. 593.

[35] [1946] K.B. 81, 87–8.

[36] [1901] A.C. 426.

[37] 84 L.J.K.B. 2236.

I would allow the appeal and remit the case to the Chancery Division in order that the question of damages may be dealt with, on the basis that the respondent union has been guilty of a breach of contract and that the court has jurisdiction to award damages for that breach. The respondent union should, in my opinion, pay the appellant's costs here and in the courts below, and the costs of any further proceedings in the Chancery Division should be dealt with by the judge before whom such proceedings come.

LORD PORTER. My Lords, the matter for your Lordships' consideration in this case is to determine the status of a registered trade union or, to put the more limited question to be decided, whether a member of a registered trade union can recover from it damages for breach of contract.

The facts have been set out and I need not repeat them. Admittedly Mr. Bonsor suffered from a breach of contract and damage was thereby caused to him, but the questions still remain who committed that breach, and whether that damage can be recovered from the union even if the commission was theirs. I should add that it is not contended that the appellant's claim is nullified by the terms of section 4 of the Trade Union Act, 1871.

Though it is admitted that Mr. Bonsor's contract was broken, the respondents submit that the union is not liable to pay damages for the breach. They are, they say, an unincorporated body of persons whose registered name is nothing more than a collective name for all its members. Moreover, they contend that Mr. Bonsor's contract was with his fellow members and not with the union, and if he sued the union he was suing all the members including himself, and no man can sue himself.

It was on this ground that *Kelly* v. *National Society of Operative Printers' Assistants*[38] was decided, and in determining the present case the Court of Appeal found themselves bound to follow that precedent. I agree with them that the two cases are not to be distinguished, and that so far as the Court of Appeal was concerned the problem has already been determined. But your Lordships are not bound by that decision and it is open to review in this House.

The question with whom the member's contract is made is, I think, closely allied with the other inquiry whether the trade union as a trade union can contract at all, or whether the agreement which a member makes is with his fellow members and not with the trade union as such. It is admitted that the rules are neutral. They might, it is said, on their face indicate a contract either with the body itself or with the other members. The first question, therefore, is with whom was the contract of membership made.

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[38] 84 L.J.K.B. 2236.

Membership is obtained through the officials of the union, but except in Rules XIX and XXII and the application form therein mentioned, I cannot find any provision regulating the election of members or prescribing who can or cannot decide whether an applicant shall be elected or not. By Rule XXII (2), however, candidates have to make application in writing to one of the secretaries and prima facie, therefore, it is to the union whose secretaries they are and not to the individuals composing it to whom application for membership is to be made, and it is that body which accepts or rejects the election of a member.

It has still, however, to be determined whether that body consists of a number of individuals or possesses some sort of entity. If it were not for the decision in the *Taff Vale* case [39] it might be possible to contend that no action could be brought against a trade union itself, but that the only right was to sue the trustees or authorized officers under section 9 of the Act of 1871. Your Lordships' House has, however, decided otherwise, and in the light of that decision it has to be determined whether a trade union possesses some kind of existence which enables it to contract and to sue and be sued for damages for breach of contract.

In the *Taff Vale* case [40] Farwell J. said: "Now, although a corporation and an individual or individuals may be the only entity "known to the common law who can sue or be sued, it is competent to the legislature to give to an association of individuals "which is neither a corporation nor a partnership nor an "individual a capacity for owning property and acting by agents, "and such capacity in the absence of express enactment to the "contrary involves the necessary correlative of liability to the "extent of such property for the acts and defaults of such agents. "It is beside the mark to say of such an association that it is "unknown to the common law. The legislature has legalized it, "and it must be dealt with by the courts according to the "intention of the legislature." Lord Macnaghten, whilst agreeing with Farwell J.'s judgment in the court of first instance, went on, however, to say [41] "the registered name is nothing "more than a collective name for all the members," and Lord Lindley says [42]: "My Lords, a careful study of the Act leads me "to the conclusion that the Court of Appeal held, and rightly "held, that trade unions are not corporations; but the court held "further that, not being corporations, power to sue and be sued "in their registered name must be conferred upon them; and "further that the language of the statutes was not sufficient for "the purpose. Upon this last point I differ from them. The "Act appears to me to indicate with sufficient clearness that the "registered name is one which may be used to denote the union "as an unincorporated society in legal proceedings as well as for "business and other purposes. The use of the name in legal "proceedings imposes no duties and alters no rights: it is only "a more convenient mode of proceeding than that which would "have to be adopted if the name could not be used. I do not "say that the use of the name is compulsory, but it is at least "permissive."

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[39] [1901] A.C. 426

[40] Ibid. 429.

On the other hand, Lord Brampton in that case and in *National Union of General and Municipal Workers* v. *Gillian*,[43] Birkett J. in the court of first instance, and Scott L.J. and Uthwatt J. in the Court of Appeal thought that the Act had created some sort of legal entity which, subject to the limitations prescribed by the Act itself, could sue or be sued like any other legal entity which had existence apart from being a mere nomenclature embracing its several members. Uthwatt J. called it a "near-corporation."

How far Lord Macnaghten intended to limit the status of a trade union I find it difficult to determine. He agreed with Farwell J., whose opinion more nearly accords with the view that the union possessed some sort of entity apart from its members, than with the view that it merely consisted of a number of individuals. Great as is the respect which must be paid to the authority of Lord Macnaghten and Lord Lindley, it has to be remembered that their opinions on this matter were obiter. It is true that they were careful to avoid giving corporate status to a trade union, but if they had meant that the Act merely provided a convenient name for a number of individuals, they must, in my opinion, have dealt with the difficulty which would

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[41] [1901] A.C. 426, 439–40.
[42] Ibid. 445.
[43] [1946] K.B. 81.

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arise in many and perhaps in almost all cases, viz., that the individuals composing the society would have altered between the date of the wrong complained of and the time at which action was brought, inasmuch as the union under its trade name must, when action was brought, have been composed of those who joined since the act complained of was done, and no longer include those who had died or otherwise ceased to be members meanwhile. If, then, they regarded an action against a trade union in its trade name as equivalent to a representative action against its individual members, I cannot agree with their view.

In my opinion, therefore, the decision by the Court of Appeal in *Kelly* v. *National Society of Operative Printers' Assistants* [44] is wrong and should be reversed, an opinion in which I am the more confirmed by the doubts cast upon it by the Court of Appeal in *Rex* v. *Cheshire County Court Judge*,[45] and by the opinion of the same body in *National Union of General and Municipal Workers* v. *Gillian*,[46] where they held that a trade union can sue for libel upon itself.

Apart from the question with whom did the member make his contract the Court of Appeal in *Kelly* v. *National Society of Operative Printers' Assistants* [47] held that he was unable to sue because the agent of the society who had done him wrong was agent for himself as well as the other members, since the persons sued were an unincorporated body of which he was one. Looked at from this angle he was suing his own agent and therefore suing himself, a thing he could not do. If, however, there has been, as I think there has, a thing created by statute, call it what you will, an entity, a body, a near-corporation, which by statute has in certain respects an existence apart from its members, then I do not see why that body should not be sued by one of its members for a breach of contract.

The exact limits of the power of a trade union to bind itself need not be determined. It may well be that it does not possess the full powers of an incorporated society. Its position is perhaps best expressed by Farwell J. in the *Taff Vale* case,[48] and I am content to adopt his wording as expressing my own view of a trade union's status. It is true that in that case the plaintiff was an outside body and not one of its own members, but Farwell J.'s words seem to me to be wide enough to embrace its liabilities not only to third parties but also to its members, inasmuch as they imply an existence of the body apart from the members of which it is composed.

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[44] 84 L.J.K.B. 2236.

[45] [1921] 2 K.B. 694.

[46] [1946] K.B. 81.

[47] 84 L.J.K.B. 2236.

[48] [1901] A.C. 426.

It will be observed that I have refrained from relying upon those cases, such as *Osborne* v. *Amalgamated Society of Railway Servants* [49] and *Yorkshire Miners' Association* v. *Howden*,[50] in which a member of a trade union has been held entitled to sue his union for wrongful expulsion, in order to avoid the suggestion that that decision depended upon the fact that the Act was ultra vires the society, but although those cases and *Amalgamated Society of Carpenters, Cabinet Makers and Joiners* v. *Braithwaite* [51] may be said to have been determined on the ground that the unions sued were acting ultra vires in the steps which they had taken, yet they establish the right of a member to sue his own union.

I would allow the appeal.

LORD MACDERMOTT. My Lords, the nature and bearing of the difficult and important issues raised by this appeal will appear more plainly if a brief reference is first made to the history of the litigation.

In 1951 Mr. Harry Bonsor sued the Musicians' Union, a registered trade union which I shall speak of as "the union," complaining that it had wrongfully expelled him from membership. He sought a declaration as to his rights and, after obtaining an amendment of his claim, an injunction and damages as well. The union defended the action, contending (inter alia) that Mr. Bonsor had been expelled in accordance with its rules, and that his statement of claim disclosed no right to damages. In the Chancery Division Upjohn J. held (a) that the expulsion occurred when the secretary of the union's Brighton branch, purporting to act under a particular rule dealing with members whose subscriptions were in arrear, erased Mr. Bonsor's name from the register of membership on July 2, 1949, and (b) that the branch secretary was not empowered to act in this manner and had done so in breach of the rules. He, accordingly, declared the expulsion to be null and void and granted an injunction restraining the union from acting upon it. But although it is clear from his careful judgment that the direct effect of this expulsion was to cause Mr. Bonsor grave difficulty in earning his living as a musician, the union being what is known as "a closed shop," the learned judge was constrained to dismiss the claim for damages on the authority of *Kelly* v. *National Society of Operative Printers' Assistants*,[52] a case in which the Court of Appeal held that a member who had been wrongfully expelled by his trade union could not recover damages against it. Both parties appealed from the decision of Upjohn J., the union still contending that the expulsion was in conformity with its rules and Mr. Bonsor still maintaining his claim for damages. The Court of Appeal unanimously dismissed the union's appeal, affirming Upjohn J. in his conclusion that the expulsion was contrary to the rules and wrongful. And by a majority (Evershed M.R. and Jenkins L.J.) it also dismissed Mr. Bonsor's cross-appeal, holding that *Kelly's* case [52] was binding upon it and could not be distinguished. My Lords, I shall refer to the reasoning of *Kelly's* case [52] later, but for the purposes of this narrative it will suffice to say that it was based upon the view that a registered trade union is only an association of individuals, and that a member who sues it is suing the individuals who are his fellow-members. That view was challenged before the Court of Appeal on behalf of Mr. Bonsor in a submission to the effect that a registered trade union was a juridical person in itself, a complete entity, a body with a legal personality separate from that of its members and as competent to contract with them as they were to contract with each other. Such being the position, the argument proceeded, the difficulties in the way of a member suing the other members of his union for damages, which influenced the Court of Appeal in *Kelly's* case,[52] did not arise; the rules of the union constituted the terms of the contract between it, as one person, and the members, including Mr. Bonsor, as distinct persons; and there having been a breach of that contract on the part of the union it, as an entity, was liable in damages irrespective of the relationship of the individual members one to another. In the Court of Appeal the Master of the Rolls and Jenkins L.J. were not prepared to accept this argument; but Denning L.J. expressed himself in favour of it and was of opinion that *Kelly's* case [52] had been wrongly decided on this as well as other grounds.

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[49] [1911] 1 Ch. 540.

[50] [1905] A.C. 256.

[51] [1922] 2 A.C. 440.

The union has not appealed from the decision of the Court of Appeal. Mr. Bonsor, unfortunately, died before it pronounced judgment dismissing his cross-appeal, but his widow and administratrix now appeals by leave from that dismissal. In

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[52] 84 L.J.K.B. 2236.

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these circumstances the only question for your Lordships' determination concerns the only form of relief which can now have any practical value or effect. It is whether Mr. Bonsor was in law entitled to recover damages against the union for his wrongful expulsion. Though not so stated in the pleadings, this claim has been treated throughout as a claim for damages for breach of contract, and it is common ground that the terms of the relevant agreement are to be found in the rules of the union. But who the contracting parties were involves the question of the union's status and is, therefore, in dispute. The rules themselves seem to me to stand neutral on that question. If the union is not a juridical person there is no difficulty in construing them as the terms of agreement between the members; but if, on the contrary, the union is a juridical person they appear equally capable of being read as the terms of agreement between the union on the one hand and its members on the other.

Such being the course of the case on its way to this House, it will be convenient to deal first of all with the issue respecting the legal nature of a registered union. Not only was this issue placed by Mr. Lester in the forefront of his argument on behalf of the appellant, but if he is right in his submissions upon it, and the union is to be regarded as a juridical person, distinct from its membership, and as having contracted with its members in the terms of its rules, then, as I see the matter, the foundation of the decision in *Kelly's* case [52] will disappear and the right to an award of damages will, in the circumstances, be established. If, however, the union is not a juridical person distinct from its membership, the basis of *Kelly's* case [52] will remain and the reasoning founded upon it will have to be examined.

My Lords, if a registered trade union is a juridical person—and to avoid confusion I should say that I propose to use that expression as connoting the characteristics and attributes of the complete legal entity for which Mr. Lester contended—it must be in consequence of the Trade Union Act, 1871, which provided for the voluntary registration of trade unions and conferred certain privileges upon unions taking advantage of that provision. There can be no question that a trade union which is not registered under that Act is not a juridical person. It is a voluntary association of persons, a combination for the purposes mentioned in the definition of "trade union" in section 23 of the Act of 1871, as modified by section 16 of the Trade Union Act (1871)

[52] 84 L.J.K.B. 2236.

Amendment Act, 1876, and section 2 of the Trade Union Act, 1913. The first step, therefore, in ascertaining the effect of registration on the nature of a trade union must be to consider such of the provisions of the Act of 1871 as appear to have a bearing on the point.

Sections 2 and 3 throw no direct light on the question, but they were enacted to deal with a situation which has to be kept in mind in construing the Act. The objects of many trade unions included purposes which had been held to be in restraint of trade, with the result that the agreements between their members were unlawful and the members themselves within reach of the criminal law. Section 2 removed the danger of prosecution, and section 3 provided that the purposes of a trade union " shall not, by reason " merely that they are in restraint of trade, be unlawful so as to " render void or voidable any agreement or trust." It was not, however, the policy of the legislature to make the whole range of trade union agreements enforceable at law. Section 4, accordingly, provides that nothing in the Act shall enable any court to entertain legal proceedings instituted with the object of directly enforcing or recovering damages for the breach of certain enumerated classes of agreement, the first of which reads as follows: " (1) Any agreement between members of a trade union " as such, concerning the conditions on which any members for " the time being of such trade union shall or shall not sell their " goods, transact business, employ, or be employed." Now, it is clear that section 4, like sections 2 and 3, is not confined in its application to unions which are registered under the subsequent provisions of the Act. It applies to trade unions within the definition to which I have already referred, and therefore to unions which are not registered and not juridical persons as well as to unions which are registered; and this, it may be added, holds good for all the classes of agreement which section 4 specifies, for there is nothing in the text to restrict any of these classes to a particular type of union. On this account section 4 can hardly be expected to furnish a positive answer to the question under discussion; nevertheless I think its description of class (1), though by no means conclusive, affords some indication of the intention of the legislature. That class of agreement is described in a manner which indicates that it was the policy of Parliament to keep the contracts of union members respecting the main purposes of their combination outside the jurisdiction of the courts. The description accords with what has long been the generally accepted view of the bond by which the members of a trade union are held in association, namely, the contract between members which is formed on admission by an acceptance of the union rules. But it does not refer to agreements between a union and its members. This omission seems natural if the only bond in contemplation was that just mentioned. But I do not think it is what one would expect if the intention was to make a juridical person of any union choosing to register, as in that case the registered union would, while the unregistered union would not, be free to circumvent this part of section 4 by the simple expedient of doing what the union here is said to have done and framing its rules so that the members were bound contractually to it; and that would be contrary to the policy of section 4, if I am right in the view already expressed that that section was meant to apply to trade unions generally and irrespective of registration.

The other provisions of section 4 do not put the matter further and I need not detail them. But the section does prompt one general reflection which it will be appropriate to mention now. I would agree with Denning L.J. that a trade union may be regarded as an entity in fact. In common parlance the term is habitually used to connote something that is in some way different from the individuals who form the combination; and I think it is right to say that the Act of 1871 (including section 4) speaks after this fashion and recognizes that a trade union and its membership may not always mean the same thing. But the same can be said of many groups which lay no claim to a legal personality, and since section 4 applies to both registered and unregistered unions, the Act's recognition of the factual entity can, in my opinion, offer no sound ground for making the registered union a legal entity as well.

Section 6 provides for registration, but neither in it nor in the fasciculus of sections, beginning with section 13, which deals with the machinery of registration and various obligations flowing therefrom, nor elsewhere, is any provision for incorporation to be found; this omission is all the more striking in view of section 5 which enacts that certain statutes, including the Companies Acts, 1862 and 1867, "shall not apply to any trade union, and the "registration of any trade union under any of the said Acts shall "be void." Then section 7 says that it shall be lawful for a registered trade union to purchase or take on lease in the names of its trustees any land not exceeding one acre and to sell, exchange, mortgage or let the same. And section 8 enacts that all the real and personal estate belonging to a registered trade union shall be vested in its trustees for the time being "for the "use and benefit of such trade union and the members thereof." At first glance the enabling form of section 7 suggests that the legislature regarded a registered trade union as an entity apart from its members which, like certain incorporated bodies, required special authority to hold land. But against this must be set the provision made in both sections 7 and 8 for the holding of union property by the union trustees, which was relied upon by the union as a clear indication that Parliament did not intend to make the registered trade union a juridical person, and as such capable of holding its own assets in its own name. Section 9 was said to point in the same direction. It provides that the trustees of a registered trade union or any other officer who may be authorized by the rules to do so shall be empowered "to "bring or defend, or cause to be brought or defended, any action, "suit, prosecution, or complaint in any court of law or equity, "touching or concerning the property, right, or claim to property "of the trade union. . . ." If, as the appellant claims, this Act made the registered union a juridical person, in the sense in which I am using the expression, there seems no very convincing reason why it should not have been left to sue and be sued respecting its property without conferring these special powers upon its officers and trustees. Section 11 makes it obligatory for the treasurer and other officers of a trade union to account and hand over balances and books in their hands when required; and in the event of any failure to comply with these obligations the trustees are empowered to sue for the balance due, etc., and "to recover their full costs of suit, to be taxed as between "attorney and client." This, of course, is not in any way conclusive, but, again, it is scarcely what one would expect if the intention was to create a body which could take these steps for itself. Section 13 deals with applications for registration, and section 14 provides, inter alia, for the union having a name which can be registered. Section 15 requires a registered trade union to have a registered office, and section 16 requires it to make annual returns. Each of these last two sections further provides that a trade union which fails to comply with its requirements shall be liable to a penalty. This was said to point to a registered trade union having a distinct personality as, at common law, an offender must be either a natural or an artificial person and must be named or otherwise identified as a person in the charge.

Reference may also be made in this connexion to sections 6 and 8 of the Act of 1876. Section 6 requires a registered trade union to be registered in that part of the kingdom where its registered office is, and provides that if it carries on business in another part of the kingdom it is not to enjoy there "any of the "privileges" of the Acts of 1871 and 1876 until the rules have been recorded by the registrar of that other part. Thus, if the act of registration creates a juristic person, it could happen, to take an example, that a union active throughout Great Britain, with one membership and one set of rules, might find itself at the same time an association of individuals in Scotland and an artificial person, a distinct legal entity, in England—or vice versa, according to the location of the registered office. The power of Parliament to do even more than that cannot be questioned, but one would expect to find the intention to produce such an anomalous situation expressed in clear terms. Section 8 evokes a similar reflection. It makes provision whereby, inter alia, a registered trade union may have its certificate of registration withdrawn or cancelled at its request, and enacts that when this is done the union shall "absolutely cease to enjoy as such the "privileges of a registered trade union, but without prejudice to "any liability actually incurred by such trade union, which may "be enforced against the same as if such withdrawal or cancelling "had not taken place." I find it difficult to believe that the legislature ever intended that a trade union should be able to accomplish a fundamental change in its legal character by this simple procedure; yet such would be the result if the appellant's contention were well founded. It would be idle to say that these sections, considered in the context in which they must be placed, make an end of the matter; but their operation is relevant, and their language suggests a further way of stating the issue. Did Parliament intend registration to create a new sort of trade union with a legal personality of its own, or merely to confer the privileges for which the Acts provide upon the unions as they were?

My Lords, if I have referred to the statutory position at some length it is because the problem under examination is essentially one of the meaning and effect of the relevant enactments and of the intention they manifest. Though this problem has produced numerous expressions of judicial opinion, these are in conflict and the state of the authorities is such that your Lordships are, I think, free to form a conclusion from the text on every material aspect of the matter save one. I do not, therefore, propose to embark on an exhaustive review of the cases cited in the course of the debate. I must, of course, refer to the decision of this House in *Taff Vale Railway Co.* v. *Amalgamated Society of Railway Servants*,[53] for it raises the exception which I have just mentioned; but after that it will be enough to direct attention to such of the pronouncements on the subject as suffice to define the issue and reveal the opposing views.

In the *Taff Vale* case[53] this House, affirming the decision of Farwell J. and reversing that of the Court of Appeal, held unanimously that a registered trade union may be sued in its registered name. That conclusion was reached as a matter of inference from the nature of trade unions and the terms of the Acts of 1871 and 1876, and though its practical importance has been much reduced by the Trade Disputes Act, 1906, the principle it established stands and must be respected in considering the effect of the material statutes. Not only may a registered union, as provided by section 9 of the Act of 1871, sue and be sued concerning its property in the names of its trustees or authorized officers; it can be sued also in its registered name and in respect of claims which lie outside the scope of that section. For the appellant, Mr. Lester relied strongly upon this decision and there can be little doubt that it has the effect of endowing the registered union with one of the more important attributes of a juristic person, and that it detracts appreciably from the force of the argument advanced on behalf of the union, which was based on the express powers of litigating conferred by the Act of 1871 upon the trustees and authorized officers. But if this is so, it is, in my opinion, equally clear that the decision was not founded on the proposition that a registered union is a juristic person. At first instance Farwell J.[54] had based his conclusion on the ground that "it is competent to the legislature to give to an association "of individuals which is neither a corporation nor a partnership "nor an individual a capacity for owning property and acting by "agents, and such capacity in the absence of express enactment "to the contrary involves the necessary correlative of liability to "the extent of such property for the acts and defaults of such "agents." And the learned judge then added: "It is beside "the mark to say of such an association that it is unknown to the "common law. The legislature has legalized it, and it must be "dealt with by the courts according to the intention of the legislature." I do not take this to mean that in the opinion of

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[53] [1901] A.C. 426.

[54] Ibid. 429.

Farwell J. a registered trade union is a juristic person. He does not say that, and if he meant it I am at a loss to understand why, as is undoubtedly the case, he took the view that the Acts had not incorporated the registered union. The absence of express provision to that end certainly furnishes no explanation of this, as it has long been held that an intent to incorporate may be implied: see *Tone River Conservators* v. *Ash.*[55] It seems to me that, far from attributing a separate personality to such a union, the reasoning of the learned judge recognizes the absence of such a personality and amounts in its substance to this—that although Parliament has not gone far enough to make the registered union other than an association of individuals, it has legalized its purposes and endowed it with powers and qualities to such an extent that an intention to fix it with corresponding responsibilities, enforceable by proceedings brought against it in its registered name, ought to be implied.

In this House Lord Halsbury L.C.[56] expressed his concurrence with the judgment of Farwell J. and added: " If the legislature " has created a thing which can own property, which can employ " servants, and which can inflict injury, it must be taken, I " think, to have impliedly given the power to make it suable in " a court of law for injuries purposely done by its authority and " procurement." Lord Macnaghten, having also agreed with the reasoning of Farwell J., then spoke in terms which leave no doubt as to his mind on the present issue. He said[57]: " The further " question remains: May a registered trade union be sued in " and by its registered name? For my part, I cannot see any " difficulty in the way of such a suit. It is quite true that a " registered trade union is not a corporation, but it has a registered name and a registered office. The registered name is " nothing more than a collective name for all the members. The " registered office is the place where it carries on business. A " partnership firm which is not a corporation, nor, I suppose, a " legal entity, may now be sued in the firm's name. And when " I find that the Act of Parliament actually provides for a registered trade union being sued in certain cases for penalties by " its registered name, as a trade union, and does not say that the " cases specified are the only cases in which it may be so sued, " I can see nothing contrary to principle, or contrary to the provisions of the Trade Union Acts, in holding that a trade union " may be sued by its registered name." Lord Shand also adopted

[55] (1829) 10 B. & C. 349.

[56] [1901] A.C. 426, 436.

[57] Ibid. 439–40.

the reasoning of Farwell J., and in a brief opinion stated his conclusion [58] that "the power of suing and liability to be sued in "the society's name is clearly and necessarily implied by the "provisions of the statutes." Lord Lindley plainly based his concurrence on the ground, not of a new status, but of the effect of the statutory provisions. "The Act," he said,[59] "appears "to me to indicate with sufficient clearness that the registered "name is one which may be used to denote the union as an unin-"corporated society in legal proceedings as well as for business "and other purposes. The use of the name in legal proceedings "imposes no duties and alters no rights: it is only a more con-"venient mode of proceeding than that which would have to be "adopted if the name could not be used. I do not say that the "use of the name is compulsory, but it is at least permissive." Lord Brampton alone took the view now contended for by the appellant, his opinion on the point being thus expressed [60]: "I "think that a legal entity was created under the Trades Unions "Act, 1871, by the registration of the society in its present name "in the manner prescribed, and that the legal entity so created, "though not perhaps in the strict sense a corporation, is never-"theless a newly created corporate body created by statute, "distinct from the unincorporated trade union, consisting of "many thousands of separate individuals, which no longer exists "under any other name."

In *Yorkshire Miners' Association* v. *Howden*,[61] a decision on the scope of section 4 of the Act of 1871, Lord Lindley affirmed the view he had previously expressed in the *Taff Vale* case [62] in a passage which reads as follows [63]: "One thing, however, the "Act of 1871 did not do. It did not incorporate trade unions "even when registered under the Act with a name. A trade "union holds property by trustees; but not being incorporated "there is no one legal person or entity in whom the beneficial "interest in the property of a trade union is vested. The bene-"ficiaries are its members collectively and severally. This is plain "from section 8, which vests the property of every registered "trade union in trustees for the use and benefit of such trade "union and the members thereof. A trade union is, and its name "is only a convenient designation for, an unincorporated society "of individuals, and this observation must not be lost sight of on "the present occasion." In *Amalgamated Society of Railway*

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[58] [1901] A.C. 426, 441.
[59] Ibid. 445.
[60] Ibid. 442.
[61] [1905] A.C. 256.
[62] [1901] A.C. 426.
[63] [1905] A.C. 256, 279–80.

Servants v. *Osborne*[64] Lord Halsbury referred to a registered trade union as "a legalized combination having power to act as "a person and to enforce its rules within the limits of the statute, "whatever those limits are"; and in the same case Lord Atkinson[65] expressed the view that trade unions "are, when registered, "quasi-corporations, resembling much more closely railway companies incorporated by statute than voluntary associations of "individuals merely bound together by contract or agreement, "express or implied." These observations of Lord Halsbury and Lord Atkinson were canvassed in support of the appellant's contention, as was also the dictum of Farwell L.J. (as he had then become) in *Osborne* v. *Amalgamated Society of Railway Servants*,[66] that "A registered trade union is thus a statutory legal "entity, anomalous in that, although consisting of a fluctuating "body of individuals and not being incorporated, it can own "property and act by agents." But, in my opinion, these dicta fall short of imputing a full juridical personality to the registered union. They recognize, what must be recognized on any view of the matter, that the legislature has conferred upon such unions some of the characteristics of a juridical person, but they do not go the length of saying, and were not, in my opinion, intended to say, that the effect of the relevant legislation has been to give those unions a new status amounting to a legal personality distinct from their membership.

I come next to what was said in the Court of Appeal in *National Union of General and Municipal Workers* v. *Gillian.*[67] That case decided that a registered trade union could possess a character capable of being defamed and could maintain an action for damages for defamation in its registered name. The defendants having pleaded that the action was not maintainable at the suit of the plaintiff union, Birkett J. had held, on a pleading issue, that the suit was maintainable and had expressed the opinion[68] that the Act of 1871 had "designedly created a new "entity in law, a new persona" in the registered union. As at present advised, I do not think that Birkett J. needed to take this view in order to reach the conclusion he did. That, however, is by the way. The present relevance of the case lies in the support which this view obtained in the Court of Appeal. Scott L.J. expressed himself thus[69]: "A trade union has many "activities; it has some existence, and it is something. The

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[64] [1910] A.C. 87, 93.

[65] Ibid. 102.

[66] [1909] 1 Ch. 163, 191.

[67] [1946] K.B. 81.

[68] [1945] 2 All E.R. 593, 594.

[69] [1946] K.B. 81, 85.

"omission of Parliament to christen it with some new generic "name is immaterial, for Parliament has absolute sovereignty "and can make new legal creatures if it likes. It is able, for "instance, to create a persona juridica not previously known to "the law, if it so chooses, or to clothe an existing association of "natural persons with what may be called co-operative personality "so as to give it the status of a persona juridica. In my view "that is just what it did in 1871. It expressly assumed the "possession by every trade union, when duly registered, of so "many of the main attributes of judicial personality that I find "any other inference of the intention of Parliament impossible." And, again [70]: "In my view, the true interpretation of the Acts "is that a trade union is given all powers of a persona juridica "except (*a*) those solely characteristic of a natural person, and "(*b*) those which are expressly excepted by the creating or "enabling statute." MacKinnon L.J. concurred, and Uthwatt J. (as he then was) dealt with the matter in these terms [71]: "The "point decided in *Taff Vale Railway Co.* v. *Amalgamated Society* "*of Railway Servants*,[72] was that a registered trade union might "properly be named as a defendant to an action. That decision "involves, to my mind, that a registered trade union is recognized "by the law as a body distinct from the individuals who from "time to time compose it. It is not a corporation; but it is very "much like one. The association is not merely the aggregate of "the persons who compose it, and the presence of the corporate "fiction is not necessary to secure its individuality. In an age "of neologism it might be called a 'near-corporation'." As I have already indicated, these expressions of opinion do not seem to me necessarily to involve the decision in *Gillian's* case [73]; but in the present suit Denning L.J. accepted them as well founded and they, no less than those I have quoted to the contrary effect, invite the most careful consideration.

My Lords, having endeavoured to give that to what has been said on the subject, both in the cases and at the Bar, I have come to the conclusion that the correct view is the view favoured by Lord Macnaghten and Lord Lindley and by the Master of the Rolls and Jenkins L.J. in the Court of Appeal. I base this opinion primarily on the statutes. The more closely they are examined the clearer it seems to be that the legislature, though minded to bestow upon registered unions some of the gifts and attributes of legal personality, had no intention of doing more and was, indeed, averse to the idea of going the whole length and making those unions new creatures, distinct in law from their membership, and fundamentally different from the "combination" of persons which the definition requires all trade unions to be. I need not go over the various provisions of the Acts again. If they point in more than one direction, on balance they seem to me to lead away from the appellant's contention; and taken together it would, I think, be right to say of them that they make of registration and its results something of far less consequence than might fairly be expected had that process been meant to bring into being a new juridical person. The comparative ease with which the garb of registration may be donned and doffed hardly accords with the view that each change means the taking up or the laying down of a legal personality; there is, however, nothing so casual or anomalous about the position if all that happens is that the union concerned gains or loses, as the case may be, certain advantages or "privileges" with their attendant responsibilities. But perhaps the most weighty consideration of all lies in the fact that Parliament has made no effort to incorporate the registered trade union. In the latter half of last century incorporation was the recognized and usual way of conferring upon an association of persons the status of a distinct legal entity, and it is clear that the draftsman of the Act of 1871 had the Companies Act of 1862 before him. Yet there is not a word about the members becoming, on registration, a body corporate, and the only reference to a seal is in relation to the work of the registry. Parliament is not, of course, restricted in its choice of possible methods for producing a given result. But when, as here, it studiously avoids a familiar and appropriate method without purporting to adopt another in its stead, its intention to reach that result may well be open to doubt. For these reasons I am of opinion that a registered trade union is not a juridical person.

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[70] [1946] K.B. 81, 86.

[71] Ibid. 87–88.

[72] [1901] A.C. 426.

[73] [1946] K.B. 81.

Having come to this conclusion it is, I think, desirable to add some observations respecting the procedural consequences of the *Taff Vale* decision.[74] How a voluntary association of persons, such as a trade union, can be sued is hardly less important than its responsibility under the law. The numbers and the changing character of its membership may be such as to make it impracticable to sue the right persons individually and difficult to obtain an order appointing representative defendants. / These difficulties are, perhaps, at their height in the case of trade unions of workmen where the membership often runs into many thousands and is subject to a constant fluctuation. Anyone—be he a member or an outsider—who seeks a remedy in the courts against an unregistered union of this nature may well be confronted at the outset with a formidable problem in determining how to constitute his suit. The *Taff Vale* decision [74] removed this obstacle to the process of adjudication in the case of the registered union by holding that Parliament had allowed it to be sued in its registered name. Where this is done the party suing, if he is to succeed, has still, of course, to show that the union concerned is, as an organized combination, responsible for the act of which he complains; but he does not need to marshal the membership on any basis of individual liability as, for example, by excluding those who are infants or who have joined since his cause of action arose or who, as a minority, have voted in his favour; nor (if a member) has he, in my opinion, even to make it clear on the face of the record that he excludes himself. The peculiarity of this procedure, like that under the rules of court in England and Northern Ireland whereby a partnership may be sued in its firm name, lies in the fact that it sanctions proceedings at law in a name which is not that of a juridical person, either natural or artificial. But that, as Farwell J. pointed out and as this House held in the *Taff Vale* case,[74] is the result of what Parliament has enacted and, anomalous though it may be, there can be little doubt that as a procedure it is a convenient and valuable aid to the administration of justice. It has, however, one consequence which ought not to be overlooked. If a union is sued to judgment in its registered name execution in respect of any sum it may be ordered to pay cannot, in my opinion, be levied on the assets of members and must be confined to the property of the union. That, as I read the judgment of Farwell J., was his view, and it was also the view of Lord Lindley, who said at the end of his speech [75]: " I will add that if a judgment or order in that form " —that is, against a trade union in its registered name—" is for " the payment of money it can, in my opinion, only be enforced " against the property of the trade union . . ." Lord Lindley did not state his reasons for this conclusion. Subsequently, in delivering the judgment of the Judicial Committee in *Wise* v. *Perpetual Trustee Co. Ld.*,[76] he said, speaking of unincorporated member clubs: " They are societies the members of which are

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[74] [1901] A.C. 426.

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[74] [1901] A.C. 426.

[75] Ibid. 445.

[76] [1903] A.C. 139, 149; 19 T.L.R. 125.

"perpetually changing. They are not partnerships; they are "not associations for gain; and the feature which distinguishes "them from other societies is that no member as such becomes "liable to pay to the funds of the society or to anyone else any "money beyond the subscriptions required by the rules of the "club to be paid so long as he remains a member." It may be, taking the view he did of the legal nature of a registered union, that Lord Lindley considered its members to be, in this respect, in a position similar to the members of a club. But I feel no certainty about that or as to whether the passage I have quoted was meant to apply to unliquidated claims. I have not, therefore, based my opinion on any analogy of this sort. I prefer to found it on what appears to me a simpler and less debatable ground. If the statutory right to sue a registered union in its registered name is exercised and a money judgment is obtained, there is no procedure available whereby execution may be levied on foot of such a judgment against the individual members. I find it hard to regard this omission as accidental but, however that may be, the fact is that Parliament has not provided any machinery for extending what I may call a registered name judgment so as to make it enforceable against members as such. The situation where the members are sued by name or by duly appointed representatives raises different and, as it seems to me, more difficult considerations, but as that situation does not arise here I express no opinion upon it.

My Lords, as counsel for the union conceded—very rightly as I think—that section 4 of the Act of 1871 did not apply to these proceedings, and as the competence of the courts to embrace a claim of this kind is not otherwise open to question, it only remains to inquire whether *Kelly's* case [77] was properly decided. The foundation of that decision, the view that a registered trade union is not a juridical person but an association of individuals, having been accepted, this question turns on the soundness of the reasoning, based on that foundation, which led to the conclusion that a member could not recover damages against his union for being expelled in breach of the contract contained in the rules.

My Lords, the salient facts in *Kelly's* case [77] are so similar to those of the present appeal that I need not refer to them at length. In each case the party seeking redress had been actually expelled from his union; in each the expulsion was wrongful and in breach of the rules forming the contract between the members;

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[77] 84 L.J.K.B. 2236.

and in each the union stood behind the expulsion and sought to justify it as warranted by the rules until it had to admit defeat on that issue before the Court of Appeal. In *Kelly's* case,[77] it is true, the expulsion was the act of a committee, while here it was the act of an official; but in my opinion this difference is not important and may be disregarded. What is important is to ascertain the ratio decidendi of *Kelly's* case.[77] As to that, it will be convenient to refer first of all to two points which appear not to form part of the ratio though this, of course, does not necessarily impair their relevance. The first arises from the words of Phillimore L.J. concerning the plaintiff[78]: ". . . if he sues the "trade union for what it has done, he is suing himself among "others." This point is not mentioned in the other judgments and it may be that it was only made by way of emphasizing what I regard as the true ground of the decision. But if, as also seems possible, it is a procedural point and was meant to suggest that a member who sues his union in its registered name cannot succeed because he is also suing himself, I think it must be wrong. The right of a member so to sue for a declaration and injunction regarding his expulsion is now well settled and I do not see how a claim for damages can be distinguished in this respect. The second matter arises on that part of the judgment of Bankes L.J. in which he says[79]: "Further than this, the very ground on "which the plaintiff succeeds in obtaining an injunction is fatal to "his claim for damages. He succeeds in that claim because he "has established that the London committee and the executive "committee in expelling him from the society acted without "authority and in defiance of the rules. Having established that "fact, it is not possible to contend that they were at the same "time the authorized agents of his fellow members to do the "acts which he complains of as constituting breaches of his "contract." I have no doubt that this point, which is not taken by the other members of the court, is outside the ratio of its decision; but I have considerable difficulty in seeing how it can be applied to the facts of *Kelly's* case[80] if I have gathered them aright. Had the union there disavowed the action of the committee the reasoning of this passage would be plainer, but instead of doing that the union appears from the reports to have approved the views of the committee and to have adopted what it had done. Here the relevant facts preclude the point, if anything more clearly. There is little more the Musicians' Union could have done to identify itself with the expulsion of Mr. Bonsor. It has made the act of the branch secretary its act and cannot now say that because the expulsion was unauthorized by the rules it has no responsibility for it.

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[77] 84 L.J.K.B. 2236.
[78] Ibid. 2238.
[79] Ibid. 2239.
[80] 84 L.J.K.B. 2236.

With these points out of the way the ratio of *Kelly's* case [80] is, I think, clear. It is, in my opinion, accurately described in that part of the headnote which says: "A member of a trade "union who has been illegally expelled by the committee . . . "cannot recover damages for breach of the contract contained "in the rules, since the committee who were responsible for "breaking the contract were acting as agents for the plaintiff "equally with his fellow members." As I read the judgments of the Court of Appeal, this was regarded by all the learned judges as the outstanding reason why the claim for damages failed. Bankes L.J. stated it more fully than the other members in saying [81]: "The plaintiff's case is that this contract has been "broken, not by all the other members personally, but by the "London committee and the executive committee acting as the "agents of those other members. It is here, I think, that the "plaintiff fails. It is true that both these bodies were appointed "by the general body of members, and as such they are the "agents of the members, but they are just as much the agents "of the plaintiff as the agents of his fellow members whom he "seeks to make liable under their collective name."

My Lords, as I follow it, this reasoning is not based on any concept peculiar to the law of trade unions. It appears to be founded on a general proposition to the effect that a member of a voluntary association who is injured by some wrongful act done by an agent of the association on behalf of its members, including himself, cannot recover against his fellow members whose responsibility, in the circumstances, will be no greater than his own. For the purposes of this appeal I am prepared to accept that proposition without inquiry as to what, if any, are the limits to be put upon it. But one of its essential ingredients is that the act complained of should be done by the agent on behalf of the injured member. Was the Court of Appeal right in holding that the committee which expelled Mr. Kelly was, in so doing, acting as his agent? In the present case Denning L.J. answered that question thus [82]: "I cannot," he said, "understand this line of "reasoning. I cannot understand how it can be said that the "committee, when they were excluding Kelly, were acting as

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[80] 84 L.J.K.B. 2236.

[81] Ibid. 2239.

[82] [1954] Ch. 479, 513; [1954] 2 W.L.R. 687; [1954] 1 All E.R. 822.

"agents on his behalf. They were acting against him, not for "him." My Lords, I think this criticism is well founded and I agree with it. Expulsion from membership of a trade union stands, as a breach of contract, in a special category. It may be that a union committee or official, while investigating a complaint against a member, can be said to be acting on his behalf. I do not need to decide that or to say where the line is to be drawn. We are now concerned with a later stage, with the act of expulsion, when what is being done is to thrust a party to the contract out of the combination on the ground that he is no longer entitled to any of the rights or privileges of membership. To say that that is done on behalf of the person expelled seems to me an unwarranted extension of the agency and quite out of keeping with reality.

For this reason I think *Kelly's* case [83] was wrongly decided, and as I see nothing else to stand in the way of an award of damages, I would therefore allow the appeal and remit the case for the purpose of assessing the amount to be recovered.

LORD KEITH OF AVONHOLM. My Lords, much of the discussion on this appeal has been directed to the question of the status of a registered trade union. On the one side it is said that such a trade union is a legal entity capable of being sued by a member for breach of his contract of membership. On the other side it is said that such a union is only a voluntary unincorporated association of individuals incapable of being sued by a member, qua member, for breach of contract. My Lords, I think that the decisions of this House show that, in a sense, a registered trade union is a legal entity, but not that it is a legal entity distinguishable at any moment of time from the members of which it is at that time composed. It remains a voluntary association of individuals but it is capable of suing and being sued in its registered name; it holds property, through trustees, against which a creditor holding a decree against it could levy execution; it acts by agents; and it has other rights and is subject to other liabilities set out in the Trade Union Acts. It differs from an unincorporated association in that it is unnecessary to consider who were the members at any particular time. For instance, it is immaterial who were the members at the time that any cause of action arose, or what members have joined the union since the cause of action arose. The registered trade union may be said to assume a collective responsibility for all members past, present and future, in respect of any cause of action for which it may be made liable, irrespective of the date of the cause of action. On the other hand, the judgment creditor can look only to the funds of such a trade union to satisfy his debt, and to the extent to which these may be augmented from time to time by contributions of members, whether new or old, they will still be available for the unsatisfied judgment creditor.

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[83] 84 L.J.K.B. 2236.

These are important attributes, or characteristics, of a registered trade union which, in my opinion, differentiate it from other voluntary associations and may entitle it to be called a legal entity, while at the same time remaining an unincorporated association of individuals. As an association its membership is constantly changing but as a registered trade union it has a permanent identity and represents its members at any moment of time. It would not, I think, be wrong to call it a legal entity.

The view which I have endeavoured to formulate is, I think, entirely consistent with the decisions and dicta in earlier trade union cases which have come before this House. In the *Taff Vale Railway* case [84] Farwell J., whose judgment was upheld by this House, does not describe a registered trade union as a legal entity, though he does so in another case to which I refer later. He uses language, however, from which, I think, the conception of such a union as a legal entity arose. For instance, he says [85]: "Now, although a corporation and an individual or individuals "may be the only entity known to the common law who can sue "or be sued, it is competent to the legislature to give to an "association of individuals which is neither a corporation nor a "partnership nor an individual a capacity for owning property and "acting by agents, and such capacity in the absence of express "enactment to the contrary involves the necessary correlative of "liability to the extent of such property for the acts and defaults "of such agents. It is beside the mark to say of such an association that it is unknown to the common law. The legislature "has legalized it, and it must be dealt with by the courts "according to the intention of the legislature." In other places he refers to it as a creature of statute. In this House Lord Halsbury L.C.[86] expressly adopted the judgment of Farwell J., and in a short sentence referred to such a trade union as a thing created by the legislature. Lord Macnaghten, Lord Shand and Lord Brampton also accepted the judgment of Farwell J. With the exception of Lord Brampton, however, none of their Lordships, in my opinion, uses language which necessarily leads to the view that he regards a registered trade union as having a legal persona separate from that of the members of which it is composed. Lord Macnaghten and Lord Lindley clearly regarded a registered trade union as a voluntary association of individuals. Lord Macnaghten says [87]: " The registered name is nothing more " than a collective name for all the members." Lord Lindley says [88]: " The Act appears to me to indicate with sufficient " clearness that the registered name is one which may be used " to denote the union as an unincorporated society in legal " proceedings as well as for business and other purposes. The " use of the name in legal proceedings imposes no duties and " alters no rights: it is only a more convenient mode of proceed-" ing than that which would have to be adopted if the name " could not be used." He points out, however, that the liability of a registered trade union is limited to the union funds. The decision of this House was to uphold an injunction granted by Farwell J. against a trade union in its registered name, but that injunction was grounded on tort and it is clearly implicit in the judgment of this House that such a trade union could be made liable in damages for tortious acts against a non-member. In fact, a very large award of damages was made against the particular trade union in that case.

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[84] [1901] A.C. 426.
[85] Ibid. 429.
[86] Ibid. 436.

In *Yorkshire Miners' Association* v. *Howden* [89] Lord Lindley said: " A trade union is, and its name is only a convenient designa-" tion for, an unincorporated society of individuals," and referring to the *Taff Vale* case [90] he said [91]: " But care was taken " in that case to point out that a trade union is not an incor-" porated society, although it may be sued in its registered " name." In *Amalgamated Society of Railway Servants* v. *Osborne* [92] the powers of a registered trade union were assimilated to the powers of a limited company or a corporation, but that was only on the question whether its rules were ultra vires of the statute. In that case, Lord Halsbury [93] referred to a registered trade union as being a " legalized combination having power to " act as a person." In *Russell* v. *Amalgamated Society of Carpenters and Joiners* [94] Lord Macnaghten again took occasion to re-affirm that a " trade union is merely an unincorporated

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[87] [1901] A.C. 426, 439–440.
[88] Ibid. 445.
[89] [1905] A.C. 256, 280.
[90] [1901] A.C. 426.
[91] [1905] A.C. 256, 280.
[92] [1910] A.C. 87.
[93] Ibid. 93.
[94] [1912] A.C. 421, 429

"society of individuals." Lastly, I should refer to what Farwell L.J. said in *Osborne* v. *Amalgamated Society of Railway Servants*[95]: "A registered trade union is thus a statutory legal "entity, anomalous in that, although consisting of a fluctuating "body of individuals and not being incorporated, it can own "property and act by agents." These words, in my opinion, indicate that Farwell L.J., in calling a registered trade union a statutory legal entity, recognizes that it is at the same time an unincorporated association of individuals, and not something standing separate and apart from the individuals of which it is composed.

This view is, in my opinion, supported by a consideration of the terms of section 4 of the Act of 1871, which prevents any court from entertaining any legal proceedings instituted with the object of directly enforcing or recovering damages for the breach of, inter alia, "any agreement between members of a trade "union as such, concerning the conditions on which any members "for the time being of such trade union shall or shall not sell "their goods, transact business, employ, or be employed." This provision is applicable alike to registered and unregistered trade unions and is only consistent with the view that in the matters covered by this head of section 4 the rules are agreements between the members. The definitions also of a trade union in the Acts of 1871, 1876 and 1913 apply equally to registered and unregistered trade unions. This may not be conclusive, but it shows that the essential quality, or inherent structure, of the two bodies remains the same.

Reference was made in the course of the argument and by Denning L.J. in the Court of Appeal to passages in the judgments of Birkett J., Scott L.J. and Uthwatt J. (as he then was) in *National Union of General and Municipal Workers* v. *Gillian*[96] on the legal status of registered trade unions. In my opinion, these passages go further than is warranted by previous authority and cannot be supported.

In the result, then, my view is that Mr. Bonsor's contract of membership was a contract between himself and the other members of the union. On the view I have endeavoured to express it may be regarded also as a contract with the trade union, for the trade union, in its registered capacity, is representative of all the members. So long as this is kept in view it is convenient to talk of a member's contract of membership as a contract with his trade union. Has, then, the plaintiff a right to sue the trade union for breach of contract?

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[95] [1909] 1 Ch. 163, 191.

[96] [1946] K.B. 81.

The Court of Appeal has held itself bound by the decision in *Kelly* v. *National Society of Operative Printers' Assistants*[97] and the question is whether *Kelly's* case[97] was rightly decided. That case was decided in the Court of Appeal by a strong court. On its facts it is indistinguishable from the present case. Kelly sought against a registered trade union a declaration, an injunction and damages in respect of illegal expulsion from the union. He was held entitled to a declaration and injunction, but his claim for damages was refused. I find it unnecessary to analyse the judgments in detail. The ratio of all the judgments appears to me to be that in complaining of the action of the officers of the union in expelling him the plaintiff was complaining of the conduct of agents of all the members of the union, including himself, and that in suing the trade union he was suing himself among others. In my opinion this reasoning suffers from an underlying fallacy. A simple example will illustrate the point. Take the case of a member who has been illegally expelled by a majority of members at a general meeting which is sufficient to bind the union. No question of agency arises here. The member may be entitled to sue the individuals of the majority for damages in some form of action. I do not find it necessary, however, to decide this point. He could not, it is clear, sue the individuals of the minority. But I see no reason why, if the union is bound by the voice of the majority, the member should not be able to sue the union as here for a declaration and injunction, and the question would then arise, clear of any question of agency, whether he could sue it for damages and recover against the union funds. If the expulsion takes place on the initiative of the union officials it appears to me that it reduces the position to an absurdity to say that the officials were acting as the expelled member's agents in the matter of the expulsion. They are no more his agents in the matter complained of than would be a majority who expelled him in a general meeting. There may be cases where a trade union disclaims the action of an official or officials and in which, accordingly, the conduct complained of cannot be said to be the act of that trade union. But in such a case the member would be speedily restored to his status as a union member and would, presumably, in the matter of any claim of damages, have to proceed against the individual or individuals concerned. But that can hardly apply in this case, where Mr.

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[97] 84 L.J.K.B. 2236.

Bonsor was excluded from his union for over four years, and where the trade union has maintained up to the Court of Appeal the validity of his expulsion.

This leaves the way clear for consideration whether there is any other reason why a registered trade union cannot be sued by a member in damages for breach of his contract of membership. The decision of this House in the *Taff Vale* case [98] leads inevitably to the conclusion that prior to 1906 a trade union could be sued, as such, in its registered name for damages for tort committed against a third party. Liability for tort was subsequently abolished by statute, but liability in contract remained, and, in principle, there is no reason why a member of such a trade union should not have the right to sue for damages for an act committed by the trade union in breach of his contract of membership under the rules. As I have said, such a union assumes a collective responsibility for all its members. It provides the element of continuing responsibility no matter how its membership changes. In no other way, in my opinion, is it possible to support the result implicit in the judgment in the *Taff Vale* case [98] that a trade union as constituted at the date of the action, or at the date of the judgment decree, or at the date of enforcement of the decree, is responsible for its tortious acts whenever committed and however much its membership has changed since the date of the tort.

In my opinion, the case of *Kelly* [99] was wrongly decided. A member of a registered trade union who has been damnified by breach of his contract of membership is entitled, in my opinion, to sue his union for damages provided his claim is not struck at by any of the provisions of section 4 of the Act of 1871. Counsel for the respondents declined, no doubt wisely, to argue that this action was so excluded, although his attention was drawn to the Scottish case of *Berry* v. *Transport and General Workers' Union.*[100] That case is very shortly reported both on the facts and on the grounds of judgment, and there may be facts undisclosed in the report that would explain the judgment. But, considering the matter independently, I agree that an action of damages by a member of a trade union for breach of contract of membership is not necessarily excluded by the statute. Much may depend on how the claim is formulated. The basis and quantification of the claim in this case has still to be considered.

I would allow the appeal.

[98] [1901] A.C. 426.

[99] 84 L.J.K.B. 2236.

[100] 1933 Session Notes 110.

LORD SOMERVELL OF HARROW. My Lords, this appeal raises two questions. First, has a member of a registered trade union who is wrongfully expelled a right to claim special damage if he can prove that he has suffered any? If the answer is "Yes," then can judgment be obtained in proceedings against the union under its registered name?

The position in law of trade unions under the various Acts of Parliament is a special one. To import into the subject such general phrases as "legal personality," "legal entity," "quasi-"corporation," whatever "quasi" may mean, may well serve to obscure that which is not in any case particularly easy to discern. I will therefore endeavour to summarize the effect of the decisions as I understand them so far as is relevant to this appeal.

It was decided in the *Taff Vale* case[101] that an action lay against a trade union in its registered name for torts committed by its agents. Section 4 of the Trade Disputes Act, 1906, removed this liability, but the procedural importance of the decision remains. Lord Lindley said[102]: "The Act appears to me to "indicate with sufficient clearness that the registered name is one "which may be used to denote the union as an unincorporated "society in legal proceedings as well as for business and other "purposes. The use of the name in legal proceedings imposes "no duties and alters no rights: it is only a more convenient "mode of proceeding than that which would have to be adopted if "the name could not be used." Lord Lindley added that, in his opinion, a judgment against the union, eo nomine, could only be enforced against the property of the union. The "suability," coupled with this limitation, avoided, apparently, any question of limiting the liability to the members, or the funds the property of the members, at the date of the tort. Although Lord Brampton[103] used the words "newly created corporate body," it is clear from the speeches of Lord Macnaghten, Lord Lindley and, I think, Lord Shand, that the association or "combination" of members remained an unincorporated association or combination. The nature of the association was unaffected by registration. Lord Halsbury adopted the judgment of Farwell J. Lord Macnaghten agreed with that judgment and clearly thought that Farwell J. had proceeded on the basis that a trade union remained a voluntary association of members, though he had not expressly so stated.

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[101] [1901] A.C. 426.

[102] Ibid. 445.

[103] Ibid. 442.

In *Osborne* v. *Amalgamated Society of Railway Servants* [104] (usually referred to as the second *Osborne* case) the plaintiff brought proceedings against the union in its registered name in respect of their alleged wrongful expulsion. He claimed declarations and an injunction. The case, as reported, was heard on two preliminary points. First, were the rules of the union in restraint of trade? If not, then its legality did not depend on the Act of 1871, and section 4 of that Act did not apply. If the rules were in restraint of trade, then it was submitted that the plaintiff's claim was a proceeding instituted with the object of directly enforcing an agreement for the application of the funds of the trade union to provide benefits to members, a proceeding which was prohibited by section 4 of the Act. The Court of Appeal considered both points, although success on either would have entitled the plaintiff to proceed to trial. It held that a wrongful expulsion action was not prohibited by section 4 of the Act of 1871. It was never suggested that proceedings in respect of the alleged wrongful expulsion were not properly brought against the union under its registered name.

The question whether section 4 of the Act of 1871 was a bar to a wrongful expulsion claim came before your Lordships' House in *Amalgamated Society of Carpenters, Cabinet Makers and Joiners* v. *Braithwaite.*[105] It was held that the section was not a bar, approving the decision of the Court of Appeal in the second *Osborne* case.[106] The action was one to restrain a threatened expulsion, so no question of damages could arise. It was again accepted that the trade union, in its registered name, was the proper defendant in wrongful expulsion proceedings.

In the meantime, the Court of Appeal had decided in *Kelly* v. *National Society of Operative Printers' Assistants* [107] that a member of the defendant society wrongfully expelled was entitled to a declaration and injunction but not to damages.

Your Lordships were invited by the appellant to distinguish the *Kelly* case [107] on the ground that the rules of the defendant union in the present case amounted to an agreement between the members and the union and not, or not solely, to an agreement of the members inter se. I do not accept this suggestion, for reasons which I will state briefly later. I propose to consider the *Kelly* case [107] on the basis that the rules contain a contract between the members. If that contract is broken by a wrongful expulsion prima facie, as it seems to me, the party aggrieved can

[104] [1911] 1 Ch. 540.

[105] [1922] 2 A.C. 440.

[106] [1911] 1 Ch. 540.

[107] 84 L.J.K.B. 2236.

claim nominal damages and special damages if he could prove any. The main defence in the *Kelly* case[107] was based on the construction of the rules and does not assist in the present appeal. The expulsion was held to have been wrongful and damages had been awarded by the county court decision. The point with which your Lordships are concerned was taken, apparently, by the court in the Court of Appeal. The reasons given by the Lords Justices have already been set out and, with respect, I am unable to accept them. If, under a contract to which there are a number of parties, the many by themselves, or through the agents of the association, purport to deprive the one of his contractual rights, the one, subject to possible procedural difficulties, must be entitled to the rights, including that to special damage, which our law confers in respect of breach of contract. It cannot, as it seems to me, be right to identify the plaintiff in such a case with those of whose acts, or of whose agent's acts, he complains, so as to deprive him of his ordinary remedies. So far as procedure is concerned, if the union in its registered name is the proper defendant for a declaration and injunction, it would seem to me to be the proper defendant also in a claim for damages, though it would, I think, be right that the trustees should be added as parties. The damages, if any, will be recoverable only from the funds.

I turn to the appellant's primary submission that the contract of each member was in the present case with the union as a contracting party. It raises two issues. First, do the rules, on their true construction, purport to effect such a contract? Secondly, has the union power under the statutes to be such a contracting party?

Even if the answer to the second question were "Yes," it would still, of course, be open to the members so to draft the rules as to constitute a contract inter se only and not a contract with the union.

In considering the rules it may be helpful to consider the general form that rules of any voluntary association, such as a members' club, would take. In such a case the name of the association plainly does not and cannot denote a contracting party, but it would be difficult not to use words which would be apt if the "name" could be a contracting party. I do not think the present rules, in their reference to the union, go beyond this. I would not myself construe them as having any other basis than a contractual one as between members. On the second question,

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[107] 84 L.J.K.B. 2236.

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whether a union would have power so to contract, I agree with the reasoning and conclusions of my noble and learned friend, Lord MacDermott, on that point and on the general position.

I, therefore, would allow the appeal, and the matter should be remitted for the appellant to prove, if she can, special damage in law from the wrongful expulsion.

Appeal allowed.

Solicitors: *Cecil Altman; Hall, Brydon, Egerton & Nicholas.*

F. C.

J. C.*

1955
Dec. 15.

1956
Jan. 11.

THOMAS COLE CONTEH AND OTHERS . . APPELLANTS;

AND

THE QUEEN . . . . RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF SIERRA LEONE
AND FROM THE WEST AFRICAN COURT OF APPEAL.

West Africa (Sierra Leone)—Criminal law—Conspiracy—To accuse of a crime—Proof of falsity of belief essential—Assessor—Interested in or connected with subject-matter of proceedings or parties—Right of objection.

Criminal Law—Conspiracy, Criminal Law—Practice—Assessor. Privy Council—Costs—Criminal cases—General rule.

The gist of the offence of conspiracy to accuse another of a crime is that the accusation should be false to the knowledge of those conspiring. Where, therefore, at the trial of the appellants, who were convicted on a charge of conspiracy to accuse certain persons of the crime of murder, the judge in the course of his summing up, while he had referred to evidence which, if believed, would support the agreement falsely to accuse, had nowhere referred to the necessity of proving the falsity of the belief, the conviction must be quashed.

At the beginning of the trial, which took place with two assessors, counsel for the accused objected to one of the assessors on the ground that he was married to a daughter of the principal person against whom the alleged conspiracy was directed (who was the principal complainant in the prosecution of the appellants), but the judge ruled that the objection was misconceived on the ground that there was nothing in the Courts Ordinance (Laws of

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* *Present*: LORD OAKSEY, LORD TUCKER, LORD SOMERVELL OF HARROW.

Sierra Leone, 1946 rev., c. 50), which gave a right to object to an assessor's sitting on a case:—

Held, that, notwithstanding the silence of the Ordinance, the objection was not misconceived. Either party, the Crown or the accused, was entitled to raise an objection to an assessor on the ground that he was interested in or connected with the subject-matter of the proceedings or those concerned so that it was undesirable for him to sit as an assessor. It would be for the judge to rule on the objection in his discretion.

The circumstances of this case did not justify a departure from the Board's general rule that in criminal cases there would be no order as to costs.

Order of the Supreme Court of Sierra Leone reversed.

APPEAL (No. 32 of 1955), by special leave, against: (1) A judgment and order of the Supreme Court of Sierra Leone (Criminal Special Sessions at Kenema) (Marke J., sitting with two assessors) (December 30, 1953) whereby the appellants were found guilty and convicted of the offence of conspiracy to accuse four persons of the crime of murder and sentenced to varying terms of imprisonment with hard labour; and (2) an order of the West African Court of Appeal (January 18, 1954) refusing the appellants' application for an extension of time within which to apply for leave to appeal to the West African Court of Appeal. All the appellants had pleaded Not Guilty.

The prosecution of the appellants for the offence of conspiracy to accuse of a crime was the sequel to an unsuccessful prosecution for murder and arose in the following circumstances.

On or about May 9, 1953, the dead body of one Siaffa Fogundia was found near Daru, in the chiefdom of Paramount Chief Samba, the principal complainant in the present proceedings against the appellants. Following the discovery, the police, on the sworn information of one of the appellants (and another person who had been convicted with the appellants but had died since the grant of special leave), arrested four persons and charged them with the murder of Fogundia. The police had received information alleging that all four accused had acted on the directions of Chief Samba, who was alleged to be a cannibal, but for some reason which was not clear Samba, although arrested, was not charged or tried.

The prosecution case—that Fogundia was killed for the purposes of cannibalism—was based mainly on the statements of the fourth accused, Momo Sao—who had twice confessed to the killing with the aid of his three co-accused, all of them said to be acting under Samba's direction.

At the trial, however, Momo Sao retracted, saying that he had thus incriminated himself and the others (complainants in the present case) at the instigation of the appellants all of whom, he alleged, desired the removal of Samba from his position as Chief, and one of whom had promised him a cash reward for his false testimony.

The present appellants supported the prosecution, but the trial resulted in the acquittal of all four accused; and shortly after the appellants were prosecuted for the common law offence of conspiracy to accuse of a crime, Samba being the principal complainant.

At the commencement of the trial the appellants objected to one of the assessors, Chief Musa Gendemeh, who was married to the daughter of Chief Samba, the principal complainant, on the ground that in the interests of justice it would not be fair for him to sit on the case. The trial judge ruled that the objection was misconceived.

Since the grant of special leave to appeal two of the appellants had died.

1955. December 15. *Dingle Foot Q.C.* and *R. K. Handoo* for the appellants. There is no criminal code in Sierra Leone and the English law applies. The main grounds of appeal may be summarized as follows: (1) It is an essential element of the common law offence of conspiracy to accuse of a crime that the accusation should be false to the knowledge of those making it. The complaint here is that not only was the word "falsely" omitted from the information, but the trial judge, in summing up, directed the jury in terms that the offence was committed if the accused agreed together to accuse any person of a crime. He did not at any stage direct them, as he should have done, that it was necessary for them to be satisfied that the accused knew the accusation to be false. (2) The Crown relied on the evidence of two witnesses. There is no dispute that the first of them was an accomplice; it is submitted that the second, who was there at the time and said that he heard the accused enter into the conspiracy, was also an accomplice. The evidence of one accomplice could not corroborate that of the other. (3) The judge sat with two assessors, one of whom was married to the daughter of Chief Samba. It was suggested that disability by marriage was not sufficient to prevent the assessor from sitting, and the judge so held. He said: "I find that the objection is misconceived. "There is nothing in the Ordinance—cap. 50 [Laws of Sierra

"Leone, 1946 rev.]—which gives a right to object to an assessor "sitting on a case, and if there were such a right I am not "satisfied that sufficient reason has been given to disqualifying "P.C. Musa Gendemeh sitting on this trial as an assessor." It is submitted that that was wrong, and that it was contrary to natural justice that the court should be partly composed of a person so closely related to the principal complainant, and it had the effect of vitiating the whole trial. (4) There was misdirection here to the assessors as to the onus of proof, because the judge directed them to consider whether the Crown had made out a prima facie case and, if so, whether such case had been weakened or discharged by the defence. (5) Under the Ordinance notice of appeal had to be lodged within 10 days of the conviction. The conviction was on December 30, 1953. The date of the application for extension of time to file notices of appeal was January 14, 1954, so that it was four days out of time. The circumstances here clearly showed that this was eminently a case in which an extension of time should have been granted.

[After reading the material evidence and the summing up, he was stopped.]

With regard to costs, there is here the special circumstance that the Crown have not thought fit to support this conviction. There have been certain criminal cases in which costs have been granted to the appellant: *Waugh* v. *The King* [1]; *Perera* v. *The King*,[2] in which the Crown did not appear. The Board refused to give costs in *Teper* v. *The Queen*.[3] The present is an exceptional case and the appellants should be given costs.

The Crown, who were represented at the hearing of the petition for special leave to appeal, did not file a printed case on the appeal or seek to support the conviction, but *J. G. Le Quesne* appeared as amicus curiae and on the question of costs. My instructions are not to say anything in defence of the course which was followed at this trial. With regard to costs, the circumstances in *Waugh's* case [4] made it a peculiar and special case; the proper view to take of it is that it was a prosecution which ought never to have been brought, and the same thing can be said of *Perera's* case.[5] The present is a totally different case: what has gone wrong here principally is misdirection. The

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[1] [1950] A.C. 203, 209, 213; 66 T.L.R. (Pt. 1) 554.

[2] [1951] A.C. 482; [1951] 1 T.L.R. 829.

[3] [1952] A.C. 480, 493; [1952] 2 T.L.R. 162; [1952] 2 All E.R. 447.

[4] [1950] A.C. 203.

[5] [1951] A.C. 482.

Crown has done today that which was thought fair to the appellants, and has no desire to make any submissions on the merits, but it would be wrong to say that it should pay the costs because of that. In *Shamdasani* v. *King-Emperor*[6] the Board was again saying in effect that those were proceedings which should never have been started, and they ordered costs to be paid. So in the three cases in which costs have been awarded, two of them are contempt cases, only one was an ordinary criminal case, and in all of them the reason was that the proceedings should never have been started at all. Here the appellants concede that there was evidence which abundantly justified the institution of proceedings.

Dingle Foot Q.C. replied.

December 15. LORD OAKSEY announced that their Lordships would humbly advise Her Majesty that the appeal should be allowed and that they would give their reasons later. There would be no order as to costs.

1956. January 11. The reasons for their Lordships' decision were given by LORD SOMERVELL OF HARROW. This is an appeal, by special leave, against a decision of the Supreme Court of Sierra Leone finding the appellants guilty of a conspiracy to accuse Paramount Chief Alfred Bockari Samba and others of having committed a crime, namely, murder.

The conviction was on December 30, 1953. On January 14 the appellants applied for extension of time to file notices of appeal, time having expired on the 10th. Leave was refused, and special leave was given to appeal against that refusal. Their Lordships, having decided to hear the appeal from the conviction, found it unnecessary to consider the refusal to extend the time or make any order thereon.

The present proceedings were a sequel to an unsuccessful prosecution for murder. On May 9, 1953, the dead body of a man called Fogundia was found within the chiefdom of Samba. On the sworn information of two of the present appellants four persons were charged with the murder. It was said that Samba was a cannibal and had directed the four to murder Fogundia. It is not clear why Samba, who was arrested, was not charged. This story was supported by one of the then accused until the trial. He then retracted and said that he had been bribed to give false testimony by the appellants, who wanted Samba's removal. The present appellants supported the prosecution, but the accused were acquitted. These proceedings followed, Samba being the principal complainant.

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[6] (1945) L.R. 72 I.A. 189, 195; 61 T.L.R. 448.

The gist of the offence charged is that the accusation should be false to the knowledge of those conspiring. It is, of course, no offence for people who believe that a crime has been committed to agree to take steps with a view to a prosecution.

The trial was one with assessors. The first submission on behalf of the appellants is that the judge failed to state clearly or at all the necessity of the prosecution establishing that the accused knew the accusation to be false. It is clear that some of the accused stated affirmatively that they believed in the accusation. Some may have merely denied that they were parties to any agreement.

Two passages from the summing up should be quoted: "To "conspire to accuse any person of murder is to conspire to do "an unlawful thing. The law does not say that you should not "bring to the notice of the police any offence which you know "to have been committed. If you know that an offence has "been committed it is your duty and the duty of everyone to "bring it to the notice of the police and the police will then "investigate the matter. There is no need for two or more to "join together, to make a bargain to accuse any person or "persons of a crime. Such a conspiracy the law does not "allow. . . .

"It is your duty to find out if there is evidence of any agree-"ment by any of the accused with the other accused or with "other persons not before you. To do something unlawful is to "accuse the P.C. and three men of the murder of Siaffa "Fogundia."

In nearly every summing up in a case of any complexity it is possible to find sentences which in the calmer and more leisurely atmosphere of an appellate court can be shown to be capable of improvement. But here the defect goes to the root of the offence. It is true that in the course of his summing up the judge referred to evidence which, if believed, would support an agreement falsely to accuse. But nowhere is there a reference to the necessity of proving the falsity of the belief. The first of the two passages might well have been understood by the assessors as meaning that any agreement by two or more to make an accusation whether believed or not would be an offence.

The Crown did not file a case or seek to support the conviction.

J. C.
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Their Lordships are of opinion that the appeal succeeds on this ground. There were other grounds put forward, to only one of which is it necessary to refer. At the beginning of the proceedings counsel for the six accused objected to one of the assessors, Musa Gendemeh, on the ground that he was married to a daughter of Samba, the object of the alleged conspiracy and the first witness for the prosecution. The Solicitor-General opposed the objection and the judge ruled as follows: "I find "that the objection is misconceived. There is nothing in the "Ordinance, cap. 50, which gives a right to object to an "assessor's sitting on a case, and if there were such a right I "am not satisfied that sufficient reason has been given to "disqualifying P.C. Musa Gendemeh sitting on this trial as an "assessor."

Notwithstanding the silence of the Ordinance their Lordships are clear that the objection was not misconceived. It might or might not have been proper to accede to it. Either party, the Crown or the accused, is entitled to raise an objection to an assessor on the ground that he is interested in or connected with the subject-matter of the proceedings or those concerned so that it is undesirable for him to sit as an assessor. It would be for the judge to rule on the objection in his discretion. In small communities it may be difficult, of course, to find assessors who are wholly unconnected with everyone concerned. It may be that in this case there would have been a difficulty in getting another assessor. Apart from any such difficulty it would seem unfortunate that one of the assessors should have been related in the degree stated to the complainant.

Their Lordships have humbly advised Her Majesty that the convictions be quashed.

Counsel for the appellants contended that the appellants ought to be allowed their costs, but their Lordships do not think that the circumstances of the case justify a departure from the general rule and there will therefore be no order as to costs.

Solicitors: *T. L. Wilson & Co.; Charles Russell & Co.*

J. C.*

1955
Dec. 14.

PERPETUAL TRUSTEE COMPANY (LIMITED) . . . . APPELLANT;

AND

PACIFIC COAL COMPANY PTY. LIMITED . RESPONDENT.

ON APPEAL FROM THE HIGH COURT OF AUSTRALIA.

Australia (New South Wales)—Mines and minerals—Coal—Fixed rent plus royalty—Provision in lease prescribing calculation of royalty —Claim for arrears—Royalty a form of rent—Statutory provisions for reduction applicable—National Security (Prices) Regulations (August 22, 1940) *(made under the National Security Act,* 1939–1940 *(Commonwealth)), regs.* 3, 23 (2)*—Prices Regulation Order No.* 985 *(March* 18, 1943)*, para.* 2 (*c*)*—Landlord and Tenant (Amendment) Act,* 1932–1947 *(New South Wales), s.* 15 (1).

Mines and Minerals. Landlord and Tenant. Emergency Legislation. "Service." "Right or privilege." "Royalty."

By regulation 3 of the National Security (Prices) Regulations, made under the National Security Act, 1939–1940, of the Commonwealth: "In these regulations . . . 'service' means— . . . (*b*) any "rights or privileges for which remuneration is payable in the "form of royalty . . . based on volume or value of goods produced."

Regulation 23 (2) empowered the Commonwealth Prices Commissioner to "fix and declare the maximum rate at which any "declared service may be supplied . . .", and by paragraph (2) of the Prices Regulation Order No. 985 made by the Commissioner on March 18, 1943, it was provided: "I fix and declare the "maximum rates per ton of coal mined at which mining rights "may be supplied in respect of coal mined from the classes of "mining properties mentioned hereunder to be— . . . (*c*) Properties "not subject to Crown lease which were privately leased on "August 31, 1939—the amount per ton of coal mined payable on "August 31, 1939."

The Landlord and Tenant (Amendment) Act, 1932–1947, of New South Wales, which was in force on August 31, 1939, provided, inter alia, for a reduction by 22½ per cent. of "rent reserved by "or under any lease" to which the Act applied.

The appellant company, by a mining lease dated September 1, 1919, demised to the respondent, a company incorporated in New South Wales and carrying on the business of coal mining, mines of coal under certain land for a term of 43 years. The lease reserved a yearly rental of £819, but provided that the respondent should be permitted to win "such a quantity of coal . . . as should "at the rate per ton hereinafter mentioned produce in any one "year . . . the said sum of £819 and at a royalty per ton of all

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* *Present*: VISCOUNT KILMUIR L.C., LORD OAKSEY, LORD MORTON OF HENRYTON, LORD REID and LORD TUCKER.

J. C.

1955

PERPETUAL TRUSTEE COMPANY (LIMITED) *v.* PACIFIC COAL COMPANY PTY. LIMITED.

"coal wrought and brought to bank . . . over and above such "quantity as may be worked in respect of such rent as aforesaid "as follows": and the lease then set out that the royalty was to be calculated at a rate per ton depending on the selling price of coal free on board at Newcastle.

The appellant claimed against the respondent for arrears of rent and royalty alleged to be due and payable under the lease for (so far as relevant to this appeal) two periods, one from July 1, 1948, to September 20, 1948, and the other from September 20, 1948, to December 31, 1950. The appellant alleged that the Prices Regulation Order No. 985 did not apply to the lease so as to reduce the amount payable by the respondent by way of royalty for the above two periods. The respondent contended that it was, inter alia, paying for rights or privileges by way of royalty on goods produced and that therefore the regulations applied:—

Held, (1) that the rights which the respondent possessed under the lease were "rights or privileges for which remuneration is "payable in the form of royalty" within the meaning of regulation 3 (*b*) of the Prices Regulations. That clause covered every case in which any remuneration in the form of royalty was payable even although part of the total remuneration might be payable in the form of a fixed rent.

(2) That the Prices Regulations contemplated the lessor under a mining lease as providing a supply of mining rights throughout the term of the lease, as and when the lessee exercised those rights, and accordingly when the commissioner made Order No. 985 on March 18, 1943, he had power to fix the maximum rates payable by the respondent under the lease.

(3) That the meaning of the words "the amount per ton of "coal mined payable on August 31, 1939," in paragraph 2 (*c*) of the commissioner's order meant the amount of royalty payable per ton of coal mined on August 31, 1939; the date referred to the mining of the coal and not to the payment of the royalty. The amount of royalty which the respondent was bound to pay in respect of coal mined on that date depended on the provisions of the lease and of the Landlord and Tenant (Amendment) Act, 1932–1947, of New South Wales. The lease required payment at a rate per ton depending on the selling price of coal free on board at Newcastle, and the Act reduced the rent payable by a tenant: as this royalty was a form of rent it therefore reduced the amount of royalty so calculated by 22½ per cent.

Judgment of the High Court of Australia (1954) 91 C.L.R. 486 affirmed.

APPEAL (No. 31 of 1955), by special leave, from a judgment of the High Court of Australia (August 20, 1954), allowing the appeal of the respondent from part of a judgment of the Full Court of the Supreme Court of New South Wales (November 30, 1953).

J. C.
1955

PERPETUAL TRUSTEE COMPANY (LIMITED) v. PACIFIC COAL COMPANY PTY. LIMITED.

The following facts and statutory provisions are taken from the judgment of the Judicial Committee: The questions to be decided on this appeal arose out of an action in which the appellant was plaintiff and the respondent was defendant. The respondent was a company incorporated under the laws of the State of New South Wales, and at all material times was carrying on the business of coal mining in New South Wales. By declaration dated September 13, 1951, the appellant claimed arrears of rent and royalty due and payable under a mining lease (hereafter referred to as "the mining lease") dated September 1, 1919. The arrears so claimed were the sum of £880 12s. 7d. in respect of the period from December 31, 1931, to March 31, 1934, and the sum of £27,488 14s. 7d. in respect of the period from March 31, 1939, to December 31, 1950. The declaration stated that by the mining lease the plaintiff (appellant) demised to the defendant (respondent) all and singular the mines, beds, veins and seams of coal, shale and minerals of a similar character in or under certain lands therein described "with full liberty to the "defendant to search for win get convert carry away sell and "dispose of the said mines of coal shale or minerals of a similar "character thereby demised together with free way leave and "right and liberty of passage and other rights enabling the defendant to load and carry away the said coal shale and other "minerals for a term of forty-three years computed from the "first day of September one thousand nine hundred and nineteen "at a yearly rental of £819 payable quarterly each year provided "that the defendant be permitted to win work carry away forth "and out of the said mines and seams of coal shale and other "minerals of a similar character such a quantity of coal shale "and such other minerals as should at the rate per ton hereinafter mentioned produce in any one year of the term thereby "created the said sum of £819 and at a royalty per ton of all "coal wrought and brought to bank from the said mines thereby "demised over and above such quantity as may be worked in "respect of such rent as aforesaid as follows: when the selling "price per ton of round or best coal obtained from the said mines "free on board at Newcastle should be less than six shillings and "three pence the royalty to be five pence per ton; when the said "selling price should be not less than six shillings and three "pence but less than seven shillings and three pence the royalty "to be six pence per ton; when the said selling price should be "not less than seven shillings and three pence but less than eight "shillings and three pence the royalty to be seven pence per ton "and so on the royalty to be increased by one penny for every "increase of one shilling in the said selling price provided that "such royalty as aforesaid should be reduced to a fixed and "constant royalty of three pence per ton in respect of all small "coal so wrought and brought to bank as aforesaid and above "such quantity as may be worked in respect of the fixed rent "thereinbefore provided and provided further that fractions of a "shilling on such selling price as aforesaid should not be taken "into account in calculating the said royalty and a royalty in "respect of all shale and other minerals of similar character "wrought and brought to bank as in the said memorandum of "lease provided. . . ."

The respondent pleaded three pleas in answer to the appellant's declaration, and the appellant demurred to those pleas. When the demurrer came on for argument the Supreme Court gave leave to the respondent to amend its pleas. Pursuant thereto the respondent filed six pleas in substitution for the original three pleas, and the demurrer was argued as demurrers to each of those six pleas. The present appeal relates only to the fourth and fifth pleas, but it is convenient to summarize the first five pleas, having regard to the arguments presented to the Board.

The first plea was limited to the sum of £333 17s. 7d., being the amount claimed in respect of the period December 31, 1931, to December 31, 1932, and alleged that that sum represented a deduction of 22½ per cent. of the rent and royalty payable in terms of the mining lease, which deduction the respondent was entitled to make by virtue of the New South Wales Reduction of Rents Act, 1931.

The second plea was limited to the sum of £9,513 10s. 2d., being the amount claimed in respect of the period January 1, 1933, to March 31, 1934, and the period March 31, 1939, to December 31, 1947, and alleged that that sum represented a deduction of 22½ per cent. of the rent and royalty payable in terms of the mining lease, which deduction the respondent was entitled to make by virtue of the Landlord and Tenant (Amendment) Act, 1932–1947. The Reduction of Rents Act, 1931, had expired on December 31, 1932, and was replaced by the Act last mentioned, which itself expired on December 31, 1947.

The third plea was limited to the sum of £649 14s. 11d., being the amount claimed in respect of the period January 1, 1948, to June 30, 1948, and alleged that Commonwealth Prices Regulation

Order No. 985 applied to the lease so as, in effect, to continue during the said period the right of the respondent to make a 22½ per cent. deduction from the amount of the rent and royalty otherwise due under the mining lease. The plea alleged that the sum pleaded to was the amount of the deduction which it was so entitled to make.

The fourth plea was limited to the sum of £1,093 10s. 5d., being the sum claimed for the period July 1, 1948, to September 20, 1948, and again relied upon Commonwealth Prices Regulation Order No. 985, but alleged that the Order had an effect upon the lease different from that alleged under the third plea. It alleged that the effect of the Order was to fix the amount payable by the defendant for the period to which the plea related at the amount which would have been payable under the mining lease on the basis of the selling price of coal f.o.b. Newcastle at August 31, 1939, less a reduction of 22½ per cent. It alleged that the sum pleaded to was a sum in excess of the amount so fixed by the Order.

The fifth plea was limited to the sum of £16,778 14s. 1d., being the sum claimed in respect of the period September 20, 1948, to December 31, 1950, and relied upon the same Prices Regulation Order No. 985 as having the same effect upon the mining lease as alleged in the fourth plea but relied upon it as having force under a Statute of New South Wales taking the place of the Commonwealth statute and regulations, which had ceased to operate on September 20, 1948.

It will be observed that the total sum mentioned in the first five pleas is the same as the sum sued for, viz., £28,369 7s. 2d.

On November 30, 1953, the Supreme Court (Street C.J., Owen and Herron JJ.) gave judgment for the respondent on the demurrers to the first and second pleas; judgment was given for the appellant on the demurrers to the third, fourth and fifth pleas, Herron J. dissenting as to the fourth and fifth pleas.

The respondent appealed to the High Court of Australia against so much of the judgment of the Supreme Court as related to its third, fourth and fifth pleas. The High Court (Dixon C.J., Webb and Fullagar JJ.) allowed the appeal and gave judgment for the respondent on the demurrers to the fourth and fifth pleas. The appellant now appealed from that decision. The High Court did not disturb the judgment of the Supreme Court on the demurrer to the third plea.

The statutes on which the first two pleas were based contained provisions for a reduction by 22½ per cent. of "rent reserved by "or under any lease," to which the statutory provisions applied (see section 6 (1) of the Reduction of Rents Act, 1931 (N.S.W.), and section 15 (1) of the Landlord and Tenant (Amendment) Act, 1932–1947 (N.S.W.)). The Supreme Court held that all the payments to be made under the mining lease were rent notwithstanding that only the fixed yearly sum of £819 was therein described as a "rental" and therefore that the two statutes just mentioned reduced the total amount of rent and royalty for the periods covered by the first and second pleas. The appellant did not lodge a cross-appeal to the High Court in respect of the decision on those two pleas.

Turning to the legislation which was relevant in respect of the fourth and fifth pleas: the National Security Act, 1939–1949, of the Federal Parliament empowered the Governor-General of the Commonwealth, for the purposes of the defence of the Commonwealth, to make regulations controlling (inter alia) rents payable under all leases, including mining leases, and to control prices of goods and moneys payable under contract or otherwise. Many regulations were made under that Act and were from time to time amended by the Governor-General. The regulations which were material to this appeal were the National Security (Prices) Regulations. The Prices Regulations were first made on August 22, 1940. They were amended from time to time, and on March 18, 1943, being the date of the making of the Prices Regulation Order No. 985 by the Commonwealth Prices Commissioner (which was relied upon in the fourth and fifth pleas) the material parts of the regulations were as follows:

"3. In these Regulations, unless the contrary intention "appears—

"'declared service' means any service declared by the "Minister, by notice in the Gazette, to be a declared service for "the purpose of these Regulations;

"'Service' means—(*a*) any service supplied or carried on by "any person or body of persons, whether incorporated or unin-"corporated, engaged in a public utility undertaking or an "industrial or commercial enterprise; and (*b*) any rights or "privileges for which remuneration is payable in the form of "royalty, stumpage, tribute, or other levy based on volume or "value of goods produced; and includes any other undertaking "or service which is declared by the Minister, by notice in the "Gazette, to be in his opinion essential to the life of the "community;

" 'rate' includes every valuable consideration whatsoever, " whether direct or indirect;

. . . . . .

" 22. (2) The Minister may, by notice in the Gazette, declare " any service to be a declared service for the purpose of these " Regulations:

" Provided that the Minister shall not make any declaration " under this sub-regulation with respect to any service supplied or " carried on by the Government of any State except with the " concurrence of the Executive Government of that State;

" (3) Any declaration by the Minister in pursuance of this " regulation may be made generally or in respect of any part of " Australia or any proclaimed area or in respect of any person or " body or association of persons;

" (4) Any such notice may, by notice in the Gazette, be " amended, varied or revoked by the Minister;

. . . . . .

" 23. (2) The Commissioner may, with respect to any declared " service, from time to time, in his absolute discretion, by order " published in the Gazette—(*a*) fix and declare the maximum rate " at which any declared service may be supplied or carried on " generally or in any part of Australia or in any proclaimed area; " or (*b*) declare that the maximum rate at which any such service " may be supplied or carried on by any person or body or association of persons shall be such rate as is fixed by notice by the " Commissioner in writing to that person or body or association " of persons.

" (2A) In particular, but without limiting the generality of the " last preceding sub-regulation, the Commissioner, in the exercise " of his powers under that sub-regulation, may fix and declare— " (*a*) different maximum rates according to differences in the " quality, description or volume of the service supplied or carried " on or in respect of different forms, modes, conditions, terms or " localities of trade, commerce or supply; (*b*) different maximum " rates for different parts of Australia or in different proclaimed " areas; (*c*) maximum rates on a sliding scale; (*d*) maximum " rates on a condition or conditions; (*e*) maximum rates for cash " or on terms; (*f*) maximum rates according to or upon any " principle or condition specified by the Commissioner; and " (*g*) maximum rates relative to such standards as he thinks " proper, or relative to the rates charged by individual suppliers

" on any date specified by the Commissioner, with such variations (if any) as in the special circumstances of the case the " Commissioner thinks fit, or so that such rates will vary in " accordance with a standard, or time, or other circumstance, or " shall vary with profits or wages, or with such costs as are " determined by the Commissioner.

" (3) The Commissioner may at any time by Order published " in the Gazette amend, vary or revoke any Order made in " pursuance of this regulation."

On November 30, 1942, the Minister, acting under the power conferred on him by the Prices Regulations, had declared that, with certain immaterial exceptions, all services supplied or carried on in Australia, were " declared " services for the purposes of the Prices Regulations.

On March 18, 1943, the Prices Commissioner made the Prices Regulation Order No. 985, the material parts of which were as follows:

" Order 985 Issued by the Commonwealth
" Prices Commissioner

" 1. . . .

" 2. I fix and declare the maximum rates per ton of coal " mined at which mining rights may be supplied in respect of " coal mined from the classes of mining properties mentioned " hereunder to be—

" (*a*) Properties subject to Crown lease which are subleased " by the Crown lessee on August 31, 1939—the amount per ton " of coal mined now payable under the Crown lease plus the " amount per ton of coal mined paid by the sublessee on " August 31, 1939 (after deducting the amount then payable " under the Crown lease).

" (*b*) Properties subject to Crown lease which were not subleased on August 31, 1939, but have since been subleased— " the amount at present payable under the Crown lease per ton " of coal mined plus one penny.

" (*c*) Properties not subject to Crown lease which were " privately leased on August 31, 1939—the amount per ton of " coal mined payable on August 31, 1939.

" (*d*) Properties not subject to Crown lease which were not " privately leased on August 31, 1939—threepence per ton.

" 3. . . .

" 4. For the purpose of this Order 'lease' includes any " contract or agreement, express or implied, whereby rights to "mine coal are granted or leased for some fixed or ascertainable "period on a consideration of the payment of a royalty, tribute "or other levy based on coal mined—and 'leased' has a "corresponding meaning."

1955. Oct. 10, 11, 12, 13, 14, 24, 31. *Sir Garfield Barwick Q.C.* (Australia) and *Ian Baillieu* for the appellant. The relevant defence pleas were founded on different statutory instruments which the respondent claims entitled it to reduce the rent to the amount which it had in fact paid. The case depends first on the construction of the National Security (Prices) Regulations, made under the National Security Act, 1939–1949, of the Commonwealth; secondly, on the question of estoppel, repugnancy or inconsistency; and thirdly, on the application of the Prices Regulation Order No. 985 of March 17, 1943, made pursuant to regulation 23 (2) of the Federal Prices Regulations. The appellant contends that the rent payable under the mining lease was not capable of control and was not controlled by Order No. 985. This is so because neither the grant of an estate in the mine itself nor the leasehold estate therein constituted a service or the supply of a service within the meaning of the Prices Regulations, and further, because the language of Order No. 985 is inapt to control any part of the rent reserved upon the mining lease.

The first question is the construction of regulation 3 (*b*) of the Prices Regulations. It is submitted that Order No. 985 does not apply to the instant case—the present lease—because on the true construction of regulation 3 (*b*) of the Prices Regulations the exercise by the lessee of the rights of ownership incident to his leasehold estate does not constitute either rights or privileges or the supply of rights or privileges within the meaning of that paragraph, for while the words themselves are apt to cover rights exercised over the land or property of another, they are inapt to describe incidents of ownership. The word "remuneration" itself is inapt to describe rent, but quite apt to describe payment for the exercise of rights over land and property. Then it is submitted that the royalty really merges in the rent and therefore it is not proper to say that the lessor is remunerated in the form of royalty. In other words, the remuneration is not exclusively by way of royalty. The definition of "service" was never relevantly extended subsequently. It would be an abuse of language to say that when the appellant sold the coal veins it supplied rights: *Rowbotham* v. *Wilson*[1]; *Ramsay* v. *Blair*.[2] Floating produce of land is true rent; and a royalty such as was here reserved is a true rent: *Daniel* v. *Gracie* [3]; *The Queen* v. *Westbrook.*[4] The demise of the mine was not the supply of a service within the meaning of the Prices Regulations. The rent reserved by the mining lease was not, nor was any part of it, remuneration for a right or privilege payable in the form of a royalty or a royalty based on the volume or value of goods produced.

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[1] (1860) 8 H.L.C. 348, 360.

[2] (1876) 1 App.Cas. 701, 703, 706.

It is submitted, next, that the regulations in any event did not authorize the making of an order affecting the exercise of rights vested before the date of the regulations. Assuming (contrary to the appellant's submission) that the demise of land is the supply by the lessor of a service to the lessee, yet that " service " is " supplied " at the date when the demise is made and the estate in the land created in the lessee. Thereafter the lessee works the demised mineral not by virtue of any continuing " supply " by the lessor but as a proprietor and by dint of his own leasehold title. The power to fix the maximum rate at which a service may be supplied can operate only with respect to services supplied on or after the date of the order purporting to fix the maximum rate for the supply of services. It cannot operate with respect to a service supplied before that date. The order here fixing the maximum rate cannot, therefore, operate upon rent reserved by leases made before the date of the order, and this mining lease was made in 1919. Neither the meaning nor the ambit of the order was affected by any subsequent amendment of the regulations. Further, the Commonwealth Defence (Transitional Provisions) Act, 1946–1947, particularly section 8, did not alter the meaning of the order or increase its ambit.

The effect of section 46 of the Acts Interpretation Act, 1901–1950, is to prevent a total invalidity. The order is to be construed so as to give it a distributable operation: applying that to this order, on the assumption that there is no power to deal with antecedent supply, one reads it as meaning only to operate on subsequent supply. Further, if Order No. 985 exceeded the power or were outside the authority which the Prices Regulations purported to confer, it would not be taken up and continued in force by section 2 (1) of the Prices Regulations Act, 1948, of New South Wales, which provides for the continuance of, inter alia, orders made under the Commonwealth Prices Regulations. [Reference was made to *Brown* v. *Green.*[5]] Where there is an ambiguity a meaning should be given to the words which best accords with the purposes of the regulations.

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[3] (1844) 6 Q.B. 145, 152.

[4] (1847) 10 Q.B. 178, 203.

[5] (1951) 84 C.L.R. 285.

Passing to the application of Order No. 985, assuming it to have been within power, it is submitted (1) that there was no "amount per ton of coal mined payable on August 31, 1939," under the lease. There was no such thing. (2) If that be held against the appellant, the amount per ton of coal mined payable on August 31, 1939, is the contract rate unreduced. Even after the Landlord and Tenant (Amendment) Act, 1932–1947, of New South Wales, was passed, the contract rate must be resorted to. If one asked the question, what is the State Act doing to the amount of royalty payable as such? the answer is, nothing. The terms of the Prices Order were inapt to control or affect any part of the rent payable under the lease.

Lastly, the respondent has a judgment in its favour that the Landlord and Tenant Act, 1932–1947, controlled the quantum of rent payable under the lease until December 31, 1947. The allowance of the second plea decided that (*a*) the whole sum under the lease would be rent; (*b*) that the rent as such and as from time to time computed under the lease was reduced by the amount of 22½ per cent.; and that the 1932 State Act operated thus to reduce the rent until December 31, 1947. A construction of the regulations and order which would peg the royalty as at August 31, 1939, is inconsistent with what was thus decided in respect of the second plea. That judicial decision on the second plea precludes the respondent contending against the appellant that the Federal law effectively controlled the same rent or any part thereof during the same period. The respondent is therefore estopped from contending that the Prices Order in fact operated to control any part of the rent payable under the lease at any time; it cannot be heard inter partes to advance that inconsistent construction: *Hoystead* v. *Commissioner of Taxation.*[6] The present is a stronger case than that, because here it is the same point which is in discussion between the parties—does the State Act apply to this transaction over a given time? The appeal should be allowed.

R. Else Mitchell Q.C. and *K. J. Holland* (both of Australia) for the respondent. The Prices Regulation Order No. 985 applies to this particular transaction for the following reasons: (1) The lease sued on was not merely a demise but in addition conferred a right or privilege to take away the coal the subject of the demise. The right or privilege so conferred was subject to payment of a royalty per ton varying with the price of coal. For the nature of a mining lease and of the right which the lessee gains by virtue of the grant, see *Rowbotham* v. *Wilson.*[7] It would be right to treat the lessee as having rights and privileges for which there was remuneration within the meaning of the definition. *Gowan* v. *Christie*[8] furnishes some justification for the view that this mining lease is a transaction which results in the production of goods, and there is every reason for saying that logically it should be dealt with in price regulations. *Greville-Nugent* v. *Mackenzie*[9] again indicates the anomalous character of a mining lease. None the less, a mining lease confers rights and privileges within the meaning of the definition in regulation 3 (*b*).

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[6] [1926] A.C. 155, 170–1; 42 T.L.R. 207.

(2) Such a right or privilege was one for which " remuneration " is payable in the form of royalty, stumpage, tribute or other " levy based on volume or value of goods produced " within the meaning of paragraph (*b*) of the definition of " service " in regulation 3 of the Prices Regulations as it stood on March 17, 1943 (the date on which Order No. 985 was made). It was said for the appellant that the grant of an estate could not amount to a right or privilege within the definition. It is submitted that a grant of an estate amounts to that in certain circumstances at least, and that this is one of those cases. To give it the appellant's construction involves reading some words into the definition, such as " otherwise than the grant of an estate." By the very words which are used it was intended to have the widest operation. " Royalty, stumpage," etc., are merely descriptive of the form or character of the payment, and are deliberately divorced from any particular legal relationships: *McCauley* v. *Federal Commissioner of Taxation*[10]; *Reid* v. *Moreland Timber Co. Pty. Ltd.*[11]; *Moffat* v. *Sheppard*[12]; *Chun Goon* v. *Reform Gold Mining Co.*[13] The matter being one of statutory construction, the correct approach is first to see what the regulations provide. Having found (as it is submitted it should be found) that the regulations cover the case of rights or privileges paid for by way of royalty on goods produced, the next step is to see if the instant case comes within the regulations. It is submitted that here the respondent was, inter alia, paying for rights or privileges by way of royalty on goods produced and therefore the regulations applied.

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[7] 8 H.L.C. 348.

[8] (1873) L.R. 2 Sc. & D. 273, 283–4.

[9] [1900] A.C. 83, 87; 16 T.L.R. 43.

[10] (1944) 69 C.L.R. 235, 240.

[11] (1946) 73 C.L.R. 1, 11.

[12] (1900) 9 C.L.R. 265, 270.

[13] (1882) 8 V.L.R. 128.

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(3) All services (with immaterial exceptions) having been declared under regulation 22 (2) of the Prices Regulations, the service constituted by the right or privilege was a "declared "service" for the purpose of those regulations.

The above three propositions establish the basis of the power in the commissioner.

(4) Order No. 985 fixed the maximum rates for the supply of coal mining rights. The order in its terms applied to rights to mine coal granted by lease or contract or agreement express or implied. On its true construction it does not merely identify properties and prescribe the rights for which future licences over those properties may be given or taken; it is apparent that the order was seeking to embrace every character of transaction whether lease or licence.

(5) Order No. 985, when it was made, had an operation, at least in respect of future grants of coal mining rights under contract or agreement, and it validly fixed the maximum rates for such rights as declared services. Assuming that the order is outside the power, the Acts Interpretation Act, 1901–1950, would save it from total invalidity by limiting it to those transactions which are within the commissioner's power. All that the Acts Interpretation Act, s. 46, does is to introduce a rule of construction; it does not justify re-writing the order. The next, and a most critical step, is that the effect of doing that would be to leave the language in the order untouched. For the effect of the Acts Interpretation Act, see *Pidoto* v. *State of Victoria* [14] and *Nelungaloo Proprietary Ltd.* v. *Commonwealth of Australia.*[15] It is submitted that the form of the order does not render it capable of undergoing anything in the process of construction which would result in reading down the general words which are used. The Acts Interpretation Act does nothing to it as a matter of language, and when it is re-enacted it is in the same form.

(6) In so far as a mining lease made before Order No. 985 did not constitute the supply of a "service" within the meaning of the Prices Regulations at the date of that order, subsequent amendments to those regulations made it clear (*a*) that a lessor must be deemed to be supplying a service, and (*b*) that such supply must be treated as taking place from day to day notwithstanding that the lease was made at an earlier point of time. These amendments are (i) the addition of regulation 3 (2) on July 19, 1945, and (ii) the addition of regulation 3 (3) and (4)

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[14] (1943) 68 C.L.R. 87, 108, 130.

[15] [1951] A.C. 34.

on April 10, 1946. The effect of sub-regulations (3) and (4) of regulation 3, read together, is to bring the order into complete conformity with the power of the commissioner, and is effective to make the order applicable to the agreement made before the order and to do so in the case of a lease. That was the view of the High Court.

(7) —which follows naturally from (6) above: If the definition of "service" prior to these amendments was not adequate to embrace the rights under the mining lease, the enlargement of the concept of supply by those amendments brought the continued supply of mining rights under a pre-existing lease within the terms of the Prices Regulations.

(8) On the basis stated in (7) above, paragraph 2 (*c*) of Order No. 985 became effective (at least as from April 10, 1946) to fix the maximum rates payable for the exercise of the rights and privileges conferred by the mining lease.

(9) No fresh declaration of services was necessary after the amendments to the Prices Regulations mentioned in (6) above, because those amendments did not create a new category of service but merely provided that certain persons (including lessors) should be deemed to be supplying the services already declared.

(10) As from January 1, 1947, the Defence (Transitional Provisions) Act, 1946, s. 6 (1), re-enacted the Prices Regulations and the declaration of all services and Order No. 985 in the form in which they then existed and gave them renewed life as if they had been made simultaneously on that date. In consequence the order effectively applied from that date to the "supply" of "services" in the sense used in the amending regulations made in 1945 and 1946.

The conclusion from the above propositions so far would cover both pleas 4 and 5.

(11) The Prices Regulation Act, 1948 (N.S.W.), s. 2 (1), again re-enacted the declaration of services and Order No. 985 as State law, and gave them renewed life as from September 20, 1948, which was the date on which they ceased to have effect as Federal law. Section 3 (2), (3) and (4) of that Act were in terms substantially identical with the amendments made to the Prices Regulations in 1945 and 1946. Looking at the new Act as being the source of power, the position is that the order must be regarded as carried forward: *Bradshaw* v. *Gilberts (Australasian) Agency (Vic.) Pty. Ltd.*[16]; *Brown* v. *Green*[17]; *In re Fletcher;*

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[16] (1952) 86 C.L.R. 209, 214–5.

[17] 84 C.L.R. 285.

Ex parte Fletcher v. *Official Receiver.*[18] If that cannot be accomplished on the Defence (Transitional Provisions) Act, it can on the Prices Regulation Act, 1948. On this point it is contended that the estoppel argument for the appellant ceases to operate, because the order is no longer dependent for its effect on the Federal law. From that point forward there is no ground for any conflict or inconsistency; indeed, from that point forward there is only one law in force—the State law. There is no competing Federal law, and pre-existing State law with which the former Federal law was said to conflict was also gone. Even if the estoppel argument be sound, it certainly cannot have any application after September 20, 1948. Further, if there be an estoppel, it is one as to the operation of an Act, a statutory instrument, and there cannot be an estoppel as to the mere language of the instrument which is employed. In any event the estoppel point could have been raised in the High Court, but was not, and it is submitted, first, that this Board is precluded from considering it, and secondly, that the Board in its discretion should not consider it. Further, the estoppel which is relied on does not arise from a decision involving a point which was necessarily and with complete precision decided by the previous judgment: *New Brunswick Railway Co.* v. *British and French Trust Corporation.*[19] No estoppel should be allowed in respect of a mere demurrer. [Reference was made to Spencer Bower on Res Judicata, 1924 ed., p. 166.]

(12) Declaration No. 2 (N.S.W.) made under the Prices Regulation Act, 1948, on September 20, 1948, expressly preserved the declaration of services of the character in question and re-declared such services in the same terms.

Sir Garfield Barwick Q.C. replied, and in addition to the authorities already cited referred to *Toowoomba Foundry Proprietary Ltd.* v. *The Commonwealth*[20] and *Goold* v. *The Great Western Deep Coal Co.*[21]

Dec. 14. The judgment of their Lordships was delivered by VISCOUNT KILMUIR L.C., who stated the facts and statutory provisions set out above and continued: After the making of Order 985 the Prices Regulations were amended from time to time in certain respects, but having regard to the view which they have formed as to the construction and effect of regulation 23 (2) their Lordships find it unnecessary to refer to any of these amendments.

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[18] [1955] 3 W.L.R. 172; [1955] 2 All E.R. 592.

[19] [1939] A.C. 1, 21; [1938] 4 All E.R. 747.

[20] (1945) 71 C.L.R. 545, 578.

[21] (1865) 2 De G.J. & S. 600, 609.

The appellant contended that the rent payable under the mining lease now in question was not capable of being controlled, and was not in fact controlled by Order 985; consequently its demurrers to the fourth and fifth pleas should have been upheld. Before considering in detail the questions which arise on this contention their Lordships must mention a further argument which Sir Garfield Barwick sought to advance for the appellant. He pointed out (1) that the respondent had succeeded on their first and second pleas on the basis that the State Act of 1932–1947 operated to reduce the rent under the mining lease, including the so-called royalty, up to December 31, 1947; (2) that the respondent now sought to argue that Order 985 operated to reduce the royalty as from January 1, 1948. He desired to argue that the respondent was estopped from putting forward this argument, for if Order 985 so operated as from January 1, 1948, it must also have so operated from March 18, 1943. The State Act and the Order could not both have operated to reduce the royalty, during the period from March 18, 1943, to December 31, 1947; therefore, said Sir Garfield, the arguments now sought to be put forward by the respondent are inconsistent with the judgment already given in their favour by the Supreme Court on their first and second pleas, and they are estopped from advancing this argument. Mr. Else Mitchell, for the respondent, submitted that the appellant should not be allowed to advance this plea of estoppel at the present stage of the proceedings. With this submission their Lordships agree. The alleged inconsistency in the respondent's pleas was present when the original pleas were delivered on November 2, 1951; yet the appellant did not base any argument upon this point in the Supreme Court. Next, this same plea of estoppel could have been advanced in the High Court, since at that stage the Supreme Court had given its decision on pleas 1 and 2 and there was no appeal from that decision. Moreover, their Lordships think that the plea raises questions of some complexity, the answer to which would depend, to some extent at least, on the rules of pleading in force in Australia and on decisions of the courts in Australia. Their Lordships have not the advantage of a judgment upon this point by the High Court, since the appellant did not think fit to take it in that court. In these circumstances their Lordships decline to allow the appellant to advance the plea of estoppel at this stage, and they now turn to a consideration of the questions arising for decision on this footing.

The first question is whether the rights which the respondent possessed under the mining lease were " rights or privileges for " which remuneration is payable in the form of royalty " within the meaning of regulation 3 (*b*). Counsel for the appellant argued that they were not. He submitted that the words " rights or " privileges " were apt to cover rights exercised over the land of another, but not to describe the incidents of ownership of the soil, whether in fee or for a term of years; that the phrase " remuneration in the form of royalty " is not apt to describe rent payable by a lessee to a lessor; and that regulation 3 (*b*) only applied where the whole of the " remuneration " was payable in the form of royalty, whereas under the mining lease, part at least of the remuneration (i.e., the dead rent of £819) was admittedly payable in the form of rent. Their Lordships appreciate that there is much force in these arguments, but they have come to the conclusion that they must fail, having regard to the wording of the regulations as a whole, and to their object as revealed by that wording. They think that when a lessee takes and carries away coal he may fairly be described as exercising a right, even although it is a right which is incident to his interest in the soil as lessee. They recognize that the sum described as a " royalty " in the mining lease has been held by the Supreme Court to be part of the rent reserved by the lease, but they think that a rent which is payable at a rate per ton of coal wrought and brought to bank is ordinarily referred to as a royalty, and it is noteworthy that this is the word which is used in the mining lease itself. Finally, they think that counsel's last argument on this point must be rejected. To accept it would be, in effect, to alter " remuneration " to " *the* remuneration " or to insert the word " only " after the words " for which remuneration is " payable " in regulation 3 (*b*). In their Lordships' opinion, the clause covers every case in which any remuneration in the form of royalty is payable even although part of the total remuneration may be payable in the form of a fixed rent.

Regulation 3 (*b*), which has just been construed, forms part of the definition of " service " which is contained in regulation 3. Reading this regulation in conjunction with regulation 23 (2) their Lordships reach the conclusion that in the regulations the lessor under the mining lease is regarded as the " supplier " of a service, namely, mining rights, and the lessee is regarded as a person who is paying the lessor remuneration for the " supply "

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of these rights. This is a curious use of words, but as the High Court observed in its judgment, " by definitions and the introduc-" tion of conclusive presumptions into the regulations . . . many " unnatural meanings have been given to words."

The next question arises on the wording of regulation 23 (2). It is admitted that the supply of mining rights under the mining lease, if it is a service, is also a " declared service " by reason of regulation 22 (2) and the declaration, already mentioned, which was made by the Minister on November 30, 1942. Regulation 23 (2) empowers the commissioner to " fix and declare the maximum " rate at which any declared service may be supplied." Counsel for the appellant contend that this regulation gives the commissioners no power to fix the rate of royalty to be paid under the mining lease, since the words " may be supplied " can only refer to a " supply " of a service after the date of an order fixing the rate, whereas the mining rights exercised by the appellant under the mining lease were " supplied " once and for all when the mining lease was executed in 1919, and thereafter there could be no " supplying " of rights. This contention was rejected by Herron J. in the Supreme Court. The High Court did not find it necessary to express a final view upon the point, but indicated an inclination to the view that the contention on behalf of the appellant was ill-founded. Their Honours observed [1]: " Now it " seems to be clear enough that paragraph (*b*) of the definition " of the words ' service,' operating as it does upon and therefore " through the expression ' declared service,' extends the applica-" tion of regulation 23 (2) beyond its natural meaning and must, " so to speak, be read into it. Regulation 23 (2) (*a*) thus should " be understood as if expressed to authorize a fixing and declaring " of the maximum rate at which any declared service including " any rights or privileges for which remuneration is payable in " the form of royalty etc. may be supplied or carried on. The " incongruity of the word ' supply ' with rights or privileges for " which a royalty is payable is obvious. But another word " inappropriately chosen is ' remuneration ' to describe a royalty. " These words evidently were intended to receive a flexible " meaning in accordance with the context and the subject-matter. " It seems almost undeniable that they cover royalties payable " in connexion with the exercise of rights or privileges granted " after the making of an order fixing or declaring the maximum " royalty payable therefor. Do they cover royalties payable in " connexion with the exercise of rights or privileges granted

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[1] (1954) 91 C.L.R. 486, 500.

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"before the making of an order fixing or declaring the maximum "royalty, and before the making of the regulations? There is "much to support the view that they do. The regulations were "dealing with 'goods and services,' a collocation familiar in "economics, and they were assigning to the latter category the "providing of rights and privileges to be exercised for the "production of goods at a royalty, etc. The word 'supply' in "relation to the category if it were not artificially extended would "be equivalent to 'perform' and, if it is to be moulded to fit "the extension of the category, the analogous meaning is to "maintain the enjoyment of the right rather than to grant it "once for all. The subject is 'price fixing' as a war measure "and it is obvious that what must be controlled are the rates "that affect the cost of production and go into the price of the "goods. It is the royalty charged de die in diem that matters, "not the grant of the right and the initial fixing of a royalty. "It is to be noticed that royalties on the value of goods "produced were included. That doubtless was because a rise in "value would mean a rise in the royalty. And that would be so "irrespective of the term for which the right or privilege was "granted."

Their Lordships have found this a difficult and doubtful point, but they have come to the conclusion that the appellant's argument fails. Their Lordships are impressed by the considerations mentioned in the judgment of the High Court and by the reasoning of Herron J., and they think that the Prices Regulations contemplated the lessor under a mining lease as providing a supply of mining rights throughout the term of the lease, as and when the lessee exercises these rights.

It follows that on March 18, 1943, when the commissioner made Order No. 985, he had power to fix the maximum rates per ton of coal payable by the lessee under the mining lease, and the last question which arises is as to the true construction of paragraph 2 (*c*) of that Order, which has already been set out.

What has to be determined is the meaning, in this context, of the words in the paragraph "the amount per ton of coal mined "payable on August 31, 1939." In their Lordships' judgment this means the amount of royalty payable per ton of coal mined on August 31, 1939: the date refers to the mining of the coal and not to the payment of the royalty. It was argued that this provision cannot be applied unless it is proved that coal in respect of which royalty was payable was in fact mined on August 31, 1939, but in their Lordships' view that is much too

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narrow a meaning to attach to this provision. The Order is not concerned with what actually happened on that date: what it is concerned with is the rate of royalty which was then in operation. In effect, it poses this question: if coal in respect of which royalty was payable had been mined on that date what would have been the rate of royalty payable in respect of that coal?

If coal in respect of which royalty was payable had been mined on August 31, 1939, it is not now disputed that the amount of royalty which the tenant was bound to pay in respect of it depended on two factors—the provisions of the lease and the provisions of the Landlord and Tenant (Amendment) Act, 1932–1947. The lease required payment at a rate per ton depending on the selling price of coal free on board at Newcastle, and the Act reduced the rent payable by a tenant: as this royalty is a form of rent it therefore reduced the amount of royalty so calculated by 22½ per cent. For example, if the result of applying the provision of the lease had been that in respect of the amount of coal mined on that date the tenant was liable to pay royalty amounting to £100 the Act would have reduced the tenant's liability so that the tenant would only have been bound to pay £77 10s. In effect, the Act reduced the rate of royalty to 77½ per cent. of the rate required by the lease, for it can make no practical difference whether the full rate of royalty is first multiplied by the total tonnage and the total is then reduced by 22½ per cent., or the full rate of royalty is first reduced by 22½ per cent. and then multiplied by the total tonnage.

It was argued that the amount of royalty per ton payable on August 31, 1939, was the full amount provided in the lease because the calculation must be taken in two stages: before the Act can apply the total amount of royalty payable under the lease must first be calculated by using the rate provided by the lease. In other words, the Act, so it was argued, has nothing to do with rate per ton, it is only concerned with the total. This argument is not without force, but in their Lordships' judgment it does not give sufficient weight to the word "payable" in the Order. Nothing was payable in 1939 except what remained after the Act had operated the statutory reduction. Strictly speaking, it is not perhaps very accurate to refer to an amount per ton being payable—what is payable is a sum of money: but in their Lordships' view what is meant by "the amount per ton . . . "payable" is the amount which the tenant has to pay in respect of each ton mined, and the tenant did not have to pay anything until the Act had operated to reduce his liability. Their Lordships must therefore reject the argument of the appellant.

For the reasons given their Lordships will humbly advise Her Majesty that this appeal should be dismissed. The appellant must pay the costs of the appeal.

Solicitors: *Galbraith & Best; Light & Fulton.*

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PERPETUAL TRUSTEE COMPANY (LIMITED)
v.
PACIFIC COAL COMPANY PTY. LIMITED.

[HOUSE OF LORDS.]

BRITISH TRANSPORT COMMISSION . . APPELLANTS;

AND

GOURLEY . . . . RESPONDENT.

H. L. (E.)*
1955
Oct. 4, 5, 6;
Dec. 8.

Damages—Tax element—Loss of earnings—Action for personal injuries—Loss of professional earnings—Whether tax which would have been payable on them must be taken into account.

The plaintiff was injured by reason of the negligence of the defendants. The trial judge awarded him £37,720 damages in respect of loss of earnings actual and prospective, paying no regard to the income tax and surtax he would have had to pay on the amount of such earnings had he not been injured. The judge alternatively assessed these damages at £6,695, taking such hypothetical tax into account. It was agreed that the plaintiff would incur no tax liability on the £37,720 or £6,695:—

Held (Lord Keith of Avonholm dissenting), that the judge ought to have taken the tax position into account, and that the award in respect of loss of earnings should be reduced to £6,695.

Per Lord Goddard (Lord Radcliffe and Lord Somervell of Harrow agreeing). Such damages are awarded as compensation, not restitution, and must be decided by the application of reasonable common sense, taking all matters which might have affected the plaintiff's tax liability into account. The same principles would be applicable in wrongful dismissal actions.

Per Earl Jowitt. There may well be a difference between actions for personal injuries and actions for wrongful dismissal in regard to the obligation of the plaintiff to pay tax on the amount of damages received, and cases on the one topic may therefore be a dangerous guide to follow on the other.

Per Lord Tucker. Expenditure which—although not actually a charge on earnings—is imposed by law as a necessary consequence of their receipt is relevant to the ascertainment of the loss suffered by the party injured.

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* *Present*: EARL JOWITT, LORD GODDARD, LORD REID, LORD RADCLIFFE, LORD TUCKER, LORD KEITH OF AVONHOLM and LORD SOMERVELL OF HARROW.

Fairholme v. *Firth & Brown Ltd.* (1933) 149 L.T. 332; 49 T.L.R. 470 considered.

Jordan v. *Limmer & Trinidad Lake Asphalt Co. Ltd.* [1946] K.B. 356; 62 T.L.R. 302; [1946] 1 All E.R. 527 and *Billingham* v. *Hughes* [1949] 1 K.B. 643; 65 T.L.R. 246; [1949] 1 All E.R. 684 overruled.

Decision of Court of Appeal reversed.

Appeal from the Court of Appeal (Somervell, Birkett and Romer L.JJ.).

This was an appeal by leave of the Court of Appeal from a judgment of that court dated July 8, 1954, affirming a judgment of Pearce J. in the Queen's Bench Division of the High Court of Justice on April 1, 1954, in favour of the respondent, Harold John Frederick Gourley, the plaintiff, in his action against the appellants, the British Transport Commission, the defendants, for £47,720 damages with costs to be taxed.

On September 21, 1951, the respondent was gravely and permanently injured in a railway accident, for which it was conceded the appellants were liable, by reason of the negligence of their servants. He was senior partner in a firm of civil engineers. He was eminent in his profession and before the accident he was earning a very large professional income. Although he was 65 years of age he made a remarkable recovery. He remained very much handicapped, but he was able to carry on his professional work on a reduced scale. Until some time in the year following the accident he was unable to take any effective part in the business of the firm. On his return to work, on account of his physical condition, a reduction was made by an agreement dated December 29, 1952, in the percentage of the profits which he was entitled to receive under the original partnership deed dated December 18, 1950. Under the original agreement he was entitled to receive 36 per cent. of the profits and the partnership was to continue for nine years from January 1, 1951. Under the further agreement he was to receive 32 per cent. of the profits in 1953 and 1954 and 28 per cent. during the remaining five years. Pearce J. found that the earnings of the partnership were likely to be reduced in the future owing to his inability to take a full part in the business. His earnings were much reduced, but he still earned a large income and damages were assessed on the basis that he would probably be able to continue to do so for several years.

The action was tried in March, 1954, and Pearce J. awarded £9,000 damages for pain and suffering and loss of amenities, and £1,000 for out-of-pocket expenses. No question arose on the appeal as to this part of the award. The judge further awarded £37,720 in respect of loss of earnings, actual and prospective, and in arriving at that sum he had no regard to the fact that, had the respondent earned such a sum, he would have had to pay income tax and surtax in respect of it. The judge, at the request of the appellants, made an alternative assessment of £6,695, representing the sum which he would have awarded if he had taken that hypothetical tax liability into account.

The details of the damages awarded for loss of earnings with the alternative awards in brackets are as follows: (a) for loss of earnings diminished under clause 14 of the original deed dealing with illness, £12,280 (£4,745); (b) for loss of earnings in 1953, ascertained at the date of judgment, £2,940 (£200); (c) for estimated loss of earnings during the remainder of the partnership term, £12,500 (£1,000); (d) for estimated loss consequent on loss of business to the partnership from the date of the accident to the termination of the partnership, £10,000 (£750).

As to item (a), it was agreed between the parties that after deduction of tax the respondent would only have received £4,745. As to item (b), the judge said that the bulk of the gross sum, had the respondent received it, would have been swallowed up by taxation. As to item (c), the judge said: "If taxation remains "at its present level the loss with which we are dealing would "be a loss of shillings, not pounds, for out of every pound the "plaintiff would only have received a shilling. The figure of "£12,500 would then be £625. But it must be remembered that "a relief of a shilling in the pound to the taxpayer would double "this figure and a relief of two shillings would treble it. On the "other hand, an addition of sixpence in the pound would halve "it. I am not proposing to attempt fiscal prognosis of taxpayers' "burdens. This figure cannot be based on exact arithmetic. It "seems to me that if tax is to be taken into account a reasonable "net figure to award under this head would be £1,000." As to item (d), the judge said: "At present rates of taxation, this loss "would be 10,000 shillings instead of pounds. If I were allowed "to take future taxation into account, I would award a sum of "£750." On the whole matter his Lordship said: "I hope that "I have not given the erroneous impression that I consider the "weighing of imponderables to be an exact science, or that I "regard arithmetic as a key that will open the gates of the "future."

Sir Andrew Clark Q.C., *Sir Frank Soskice Q.C.* and *Humphrey Edmunds* for the appellants. The only question is whether the amount of damages awarded for loss of earnings should take into account the income tax and surtax which the respondent would have had to pay if he had continued at work. The amount awarded took no account of tax and that was a wrong basis of calculation. *Billingham* v. *Hughes*[1] should be overruled. It is indistinguishable from the present case.

Excluding cases of penal or exemplary damages, the rule is that where injury is to be compensated by damages the tribunal assessing them should as nearly as possible arrive at a sum which will put the injured party in the same position financially as he would have been in if he had not sustained the injury. Where damages involve a pre-estimate of possible future earnings one must take into account the tax which would have been payable on them. Actions in respect of personal injuries cannot logically be distinguished from actions in respect of wrongful dismissal in cases where the contract of employment is at an end. In the case of a wrongful dismissal the employee may either stand on the contract and sue each year for the salary due, refusing to accept repudiation and saying that he was ready and willing to serve the employer, in which case he could only get the net amount after deduction of tax, or he may elect to sue for damages for wrongful dismissal, accepting the repudiation, in which case the contract is at an end and he would be getting damages for loss of his contractual rights, a capital asset, and income tax would not be payable in respect of them.

The plaintiff must be compensated for what he has in fact lost. In cases of tort the only damages recoverable are those directly attributable to it. He may get less than a complete indemnity, but in no circumstances can he get more. What he is to be compensated for in the case of loss of earning capacity due to physical injuries is loss of his capacity to earn which is a capital asset. The compensation will be the value to him of the lost earning capacity and nothing more. The gross amount of the money which he might have earned would not be fair compensation; it is part of the evidence from which fair compensation may be deduced. The loss can only be measured by taking into account the diminution of the fruits of his work which would have occurred if he had not been injured. If the compensation were assessed on the basis of gross earnings without any diminution for income tax and surtax the plaintiff would be receiving more than he could have received if he had not been injured and so would be put in a more beneficial state.

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[1] [1949] 1 K.B. 643; 65 T.L.R. 246; [1949] 1 All E.R. 684.

As to the general principles which govern the matter, see *Livingtone* v. *Rawyards Coal Co.*[2] and *Shearman* v. *Folland*,[3] where Mayne on Damages, 11th ed., p. 151, was relied on.

One cannot earn money without having to pay income tax and therefore it must be taken into account. The insurance cases are irrelevant: see *Yates* v. *Whyte.*[4]

The first case dealing directly with income tax in relation to this problem, *Fairholme* v. *Firth & Brown Ltd.*,[5] was wrongly decided. It is not suggested that there is any distinction between a case where income tax is payable by the recipient under Schedule D and the case where tax is deductible by the employer under P.A.Y.E., but it is clear that if it had been a P.A.Y.E. case the reasoning in *Fairholme's* case [5] could not have been applied. The judge in that case grounded himself on res inter alios acta, yet if a person wrongfully dismissed obtained other employment, that would reduce the damages although it was res inter alios acta. The position in relation to tax is precisely the same.

In *M'Daid* v. *Clyde Navigation Trustees* [6] the court in Scotland went the other way. The appellants adopt what Lord Sorn there said on this point in the first part of his judgment. The first English case on personal injuries was *Jordan* v. *Limmer & Trinidad Lake Asphalt Co. Ltd.*,[7] in which *Fairholme's* case [8] was followed. In *Blackwood* v. *Andre*,[9] another Scottish case, the decision was similar.

The respondent will incur no tax liability in respect of the damages awarded to him. It is clear that payments of this sort are not subject to tax. That has been laid down in cases of compensation for loss of office.

In a case such as *Billingham* v. *Hughes* [10] it is wrong to say that the plaintiff, a surgeon, must be given restitutio in integrum vis-à-vis his patients; he must be given restitutio in integrum vis-à-vis his bank balance. There should have been no distinction made between the expenses of carrying on his practice, which were to be deducted in calculating his profits, and what he was obliged to pay to the Revenue. It is to be noted that in that case the damages were reduced because the plaintiff would thereafter have more time to devote to another branch of his profession. Again the decision was based on the incidence of tax being res inter alios acta. That is the fallacy underlying all these decisions. It is not a question of whether it is res inter alios acta or not but of whether it is too remote.

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[2] (1880) 5 App.Cas. 25, 39.

[3] [1950] 2 K.B. 43, 45–46; [1950] 1 T.L.R. 853; [1950] 1 All E.R. 976.

[4] (1838) 4 Bing.N.C. 272, 282.

[5] (1933) 149 L.T. 332; 49 T.L.R. 470.

[6] 1946 S.C. 462.

[7] [1946] K.B. 356; 62 T.L.R. 302; [1946] 1 All E.R. 527.

[8] 149 L.T. 332.

[9] 1947 S.C. 333.

[10] [1949] 1 K.B. 643.

In the assessment of compensation for the compulsory acquisition of a business the principle to be applied is exactly the same as in the assessment of compensation for loss of business due to personal injuries or breach of contract: see *Comyn* v. *Attorney-General.*[11] That decision is right, but the distinction between the position of acquisition by the State and acquisition by others is wrong and fallacious. This again is based on res inter alios acta.

W. Rought Ltd. v. *West Suffolk County Council* [12] was wrongly decided.

If a man is suing for loss of business depending on his personality (e.g., the case of a barrister or an advertising agent), he must be compensated for the value of it to him and not given the market value, which might be nil. This is an application of the same principle for which the appellants contend.

As to liability to tax in the case of compensation for loss of office, see *Henley* v. *Murray.*[13]

In summary, the payment of income tax on earnings necessarily arises from their receipt. It is inextricably bound up with the power to earn, and although it may be res inter alios acta it cannot be too remote unless it is something wholly divorced from the earning capacity for which compensation is being paid. The object of awarding damages for personal injuries is to compensate the injured person for what he has lost in the past and is likely to lose in the future. All that the plaintiff has lost in the past and all that he will lose in the future is the amount of his earnings less tax. The true way to compensate him is to give him the sum equivalent to what he would have enjoyed from his earnings after paying the liabilities attached to those earnings. To do otherwise would be to enable him to make a profit out of his injuries.

[11] [1950] I.R. 142, 166, 177.

[12] [1955] 2 Q.B. 338, 348–349, 352; [1955] 2 All E.R. 337.

[13] [1950] 1 All E.R. 908, 909; 31 T.C. 351, 363.

G. J. Paull Q.C., *D. M. Wacher* and *C. N. Beattie* for the respondent. The respondent challenges the whole of the appellants' basis for assessing damages in cases of tort and breach of contract that the party should be put, as far as possible, in the position he would have been in but for the tort. That is the rule under the Fatal Accidents Act, 1846, but not at common law. The true basis of an award of damages for tort or breach of contract is such a sum as the plaintiff can show that he has lost as the direct consequence of the tort or breach of contract. The wrongdoer cannot inquire into the indirect consequences which may ensue, nor can the sufferer claim in respect of any indirect loss. The law pays no attention to the consequences of a consequence. Tucker L.J. (as he then was) was right in what he said in *Billingham* v. *Hughes*.[14] If, in assessing damages, one goes beyond the consideration of what the plaintiff would have received, one gets into a morass. It is notable that in *Bradburn* v. *Great Western Railway Co.*[15] an argument similar to that of the appellants in the present case was submitted.

No consideration should be given to the tax which the plaintiff would have paid if he had not been prevented from earning the income in question. The relevant tax Schedule is Schedule D, and tax under that Schedule is not payable until several months after the income has been earned. It is not a charge on the money itself. The wrongdoer has no right to inquire what use the plaintiff would have made of his money in the meantime before he discharged his debt to the State. Take the case of a successful professional man who from January to December in a given year earns £30,000. It is then his to do as he likes with and it is not until several months later that he owes any debt to the State. Suppose that, having been disabled by an accident and having brought an action, he can show on the trial that he regularly invested his earnings in appreciating securities (e.g., Burmah Oil Co. Ltd.), and that in the relevant period, when he was disabled from earning, those particular shares quadrupled in value, so that he lost those tax-free profits, he could not claim in respect of that loss, but on the principles suggested by the appellants he would be able to do so. Similarly, he might be able to show that his inability to earn had prevented him from backing a theatrical show which in the event made an enormous profit. The very reason why the courts have developed the rule that one can only deal with the direct consequences of the accident is that, though this may sometimes lead to hardship,

[14] [1949] 1 K.B. 643, 649.

[15] (1874) L.R. 10 Ex. 1.

once one departs from it one gets into a morass: see *Jebsen* v. *East and West India Dock Co.*[16] and *Mediana* (*Owners*) v. *Comet* (*Owners*).[17] In this case the wrongdoer has no right to inquire what use the plaintiff would make of his money held in his hands until he discharges a debt to the State. It is true that one must try to assess a sum which, looking at the matter very broadly, will compensate the plaintiff for the loss he has suffered, but one must stop somewhere in looking at the consequences. What one is compensating a man for is his loss of earning capacity. What he does with his earnings one does not look at: see *Liesbosch* (*Owners*) v. *Edison* (*Owners*).[18] In compensating a man for loss of earning capacity one may look at anything which shows what that earning capacity is. The capacity is the capacity to earn income. What happens to it after it is earned cannot be gone into. If one could do so, a man might come to court and prove that he would have done something with his income which would have produced a considerable profit. In the case of an action arising out of damage to a ship one is entitled to look at its earnings but not to take into consideration the fact that the State would take away part of those earnings if they were received.

The consequence of this accident is that the plaintiff has lost part of his income. The consequences of his loss may be numerous. He may have to sell capital assets at a loss or lose the profit which he would have obtained through placing the money he would have received. One cannot ignore these consequences and yet look at the consequences of his tax liability. One is compensating the plaintiff for loss of earning capacity and in assessing that loss one expresses the result in a capital sum or a lump sum; they are not distinguishable. If the plaintiff invested the lump sum he would pay tax on the income from it. The lump sum should be calculated on the basis of actual earnings because if the liability to tax has already been taken into account in assessing the lump sum the plaintiff would be paying tax on his income twice over. Thus he would not be compensated for the loss of his earning capacity.

A man with a substantial income, having two daughters who were minors, might intend to make a life covenant to pay them each £3,000 a year when they attained 21. But if he were claiming damages for loss of earning capacity resulting from an accident, his damages could not be enlarged because of the tax relief he would have obtained if he had been able to carry out his intention. One cannot take into account things that may happen to a man's income: see *Jordan* v. *Limmer & Trinidad Lake Asphalt Co. Ltd.*[19] and *Billingham* v. *Hughes*.[20] In assessing damages for loss of earning capacity it is too remote to take into account taxation payable at the will of a third party, Parliament, some months after the income has been received. Further, it is not certain that Parliament will not enact, perhaps retrospectively, that damages shall be liable to tax.

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[16] (1875) L.R. 10 C.P. 300, 305.

[17] [1900] A.C. 113, 114, 117; 16 T.L.R. 194.

[18] [1933] A.C. 449, 459–460; sub nom. *The Edison*, 49 T.L.R. 289.

If the plaintiff established that he was going to work abroad, that would not increase his damages on the ground that he was going to a country where the rate of tax was lower than here, any more than it would increase them if he showed that he would have benefited by a tax-free appreciation by investing his earnings in stocks which rose in value. If a businessman earning £5,000 a year made a loss of £4,000 a year on a farm which he owned, that could not be taken into account in assessing damages.

The present case appears deceptively simple. In truth the appellants are seeking to go outside the direct consequences of the accident, whereas the whole basis of damages for loss of earning capacity is that the assessment does not depend on payments which are to be made afterwards.

As to P.A.Y.E. and Schedule E, it is possible to distinguish these cases, though it is not submitted that it would be right to do so. Though in general the taxpayer pays what he owes to the Inland Revenue a considerable time after the income has been earned, in some cases, for the convenience of collection, the tax is collected before payment. Both in the case of P.A.Y.E. and Schedule E personal allowances may be put against the tax. At the end of the year there may be an adjustment. The contract of employment is not to pay £500 a year less tax but £500 a year. As to surtax, that is not calculated on any part of the income but on the income as a whole calculated according to certain rules.

One may illustrate the position from the case of a professional man with an income of, say, £9,000 a year, who suffered an accident shortly after he bought a farm, the maintenance claim in respect of which was expected to show an excess enabling him to reduce his tax liability on his professional income. He expected to spend sums on capital improvement, enabling him to take advantage of section 16 of the Finance Act, 1954, dealing with investment allowances. If he made a loss on his farm he would also be able to invoke section 341 of the Income Tax Act, 1952, to obtain an adjustment of his professional income. Suppose him to have covenanted to pay his two daughters all his professional income in excess of £7,000 and to pay his mother £1,000 a year. Suppose he has a life assurance policy for a capital sum payable at the age of 65 or at death and that this costs him £2,000 a year, so that he gets a tax allowance on the premium. Suppose his wife has a separate income of £5,000 a year. Suppose his method of meeting his tax liability is to invest all the sums he receives, over and above what is necessary to meet current expenses, half in tax reserve certificates and half in investments selected for capital appreciation. Suppose that as the result of the accident his professional income is reduced to £2,000. In his action for damages he proves that he has had to sell his farm at a capital loss of £10,000 since he can no longer afford the risk of making a loss on it or the cost of maintaining it; that he can no longer pay the money he formerly did to his daughters and to his mother and that they have come to live with him and he supports them; that he has had to cancel his policy of life assurance because he can no longer afford the premiums; that he can no longer meet his tax liability in part out of the interest and capital appreciation of investments into which he put his earnings; that he can no longer buy tax reserve certificates. The respondent's submission is that in awarding damages the court looks simply at the reduction of his income and awards him a capital sum on that loss. If the appellants were right a complex calculation would be necessary, involving such questions as whether or not one should look at the husband's and the wife's incomes together, and whether or not one disregarded the covenants. If such a plaintiff were divorced by his wife and were ordered to pay her £500 a year maintenance, would his damages increase? If a plaintiff married a wife whose income increased his, would the damages be reduced? Does the capital loss involved in selling the farm increase the damages? However, all these questions are outside the scope of the material factors to be considered. They are indirect and not direct consequences of the accident.

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[19] [1946] K.B. 356, 359.

[20] [1949] 1 K.B. 643, 655.

A small shopkeeper gets his money week by week; without it he cannot get his stock. But the fact that he pays out the money a year later does not prevent that money making money for him in the meantime. During that time it is his money, but what he does with it is irrelevant to such a question as the present.

It has been suggested that if tax is disregarded in assessing damages it would be more profitable for a man to be run over by a bus than to continue in business, but men are not likely to get themselves run over deliberately.

In assessing damages one can never arrive at a precise sum; one must draw the line somewhere in the factors one considers, and if the whole field indicated were open to a defendant, gross injustice might be done. If one cannot go into all the indirect consequences of the loss of earning capacity, one should not go into some of them. Tax liability is only one of the consequences of earning. To deduct the amount of income tax in assessing damages would in very many cases produce injustice.

Sir Andrew Clark Q.C. in reply. The matter can be illustrated by supposing two men walking down the street, one employed by U.N.O. at a salary of £2,500 a year tax free, and the other employed by an English company at the same salary but subject to income tax and surtax. If they were both knocked down and seriously and permanently injured by the same bus, then, on the argument for the respondent, both would be awarded the same amount of damages for loss of earnings, although the loss to the former would be far greater than the loss to the latter. If the man employed by U.N.O. had been wrongfully dismissed but had obtained another position with an English company at the same salary but subject to tax, he would on the argument for the respondent be entitled to no damages at all. The cases cited for the respondent, *Jebsen* v. *East and West India Dock Co.*,[21] *Mediana (Owners)* v. *Comet (Owners)*[22] and *Liesbosch (Owners)* v. *Edison (Owners)*,[23] are instances of matters which are too remote to be considered, but none of them touches the case of income tax. One gets no assistance from them and they are not inconsistent with the appellants' submissions.

The broad general principle is that in assessing damages in a case of tort two factors have to be taken into consideration, (1) the damage ensuing directly from the tort, and (2), where the tort has resulted in a loss of earnings, a calculation based on the profits which would have been earned but for the injury. In this calculation one cannot ignore anything which is a necessary ingredient in earning the income or any liability which will necessarily arise from earning it. Anything which might or might not arise is too remote. Liability to income tax is not a question of something which the respondent might or might not have done with his money. It is a liability attached inextricably to the earning of income.

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[21] L.R. 10 C.P. 300.

[22] [1900] A.C. 113, 121–122.

[23] [1933] A.C. 449, 460, 461.

It was submitted for the respondent that if income tax were taken into account one must also examine and take into account what he would have done with his earnings before he paid the Revenue. But that is too remote. Admittedly there is a time-lag between the receipt of the income and payment of the tax on it, and one can make use of the money in the interval; that may be a factor for which some allowance should be made, but one cannot examine whether the taxpayer would have speculated with the money and been lucky or unlucky in his speculations.

It was said that unless one makes a complete inquiry into the situation, the only alternative is to ascertain the actual earnings and look no further. But even if one did draw the line there it would not hurt the appellants' case, for, as soon as one ascertains the earnings, there is an income tax liability which has come into existence simultaneously with the earnings.

The example put by the respondent of a plaintiff who has been ordered to pay maintenance to his divorced wife, and the suggestion that on the appellants' argument that circumstance would affect the amount of his damages, cannot be to the point, because that is a liability which would remain whether he were earning or not. The same is true of the example given by the respondent of the plaintiff who has covenanted to pay his mother £1,000 a year.

As to the suggestion that to take account of income tax at the stage of assessing damages would have the effect of double taxation, that is a fallacy. If the damages are properly assessed no question of double taxation can arise.

It is inconceivable that an Act of Parliament with retrospective effect should make these damages liable to tax.

The problem of the illustration given on behalf of the respondent is solved by regarding the income of the hypothetical taxpayer as being reduced by his covenants and finding what tax he was in fact paying. One can only take into account any existing liability, legal or equitable.

There is nothing in the point that it would be impossible to assess the amount of future taxation. Admittedly it cannot be accurately assessed but nor can the amount of future earnings. Both can only be the subject of estimates taking into account all relevant considerations. The difficulty of estimating future income is not materially increased by taking into consideration the incidence thereon of future taxation.

Their Lordships took time for consideration.

Dec. 8, 1955. EARL JOWITT. My Lords, the respondent, who is an eminent civil engineer, suffered severe injuries whilst travelling in a railway train, owing to the negligence of the appellants' servants, and brought his action to recover damages. The trial judge awarded him £9,000 for pain and suffering and loss of amenities, and £1,000 in respect of out-of-pocket expenses. No question arose in this appeal as to this part of the award. The trial judge further awarded the respondent the sum of £37,720 in respect of loss of earnings actual and prospective, and in arriving at this sum paid no regard to the fact that had the respondent been able by his activities in his profession as a civil engineer to achieve the earnings represented by the sum of £37,720 he would have had to pay a large amount in respect of income tax and surtax on the amount of such earnings. The trial judge, at the request of the appellants, made an alternative assessment of £6,695, which represented the sum he would have awarded if he ought to have taken into account in assessing damages the tax which the respondent would have had to pay if he had in fact earned by his professional activities the sums lost. It was agreed by counsel on both sides—and I think rightly agreed—that the respondent would incur no tax liability in respect of the award of £37,720, or alternatively of £6,695.

The question for determination in this appeal is whether the judge ought to have taken the tax position into account in assessing that part of the damages attributable to loss of earnings actual or prospective.

The broad general principle which should govern the assessment of damages in cases such as this is that the tribunal should award the injured party such a sum of money as will put him in the same position as he would have been in if he had not sustained the injuries: see *per* Lord Blackburn in *Livingstone* v. *Rawyards Coal Co.*[1] The principle is sometimes referred to as the principle of restitutio in integrum; but it is manifest that no award of money can possibly compensate a man for such grievous injuries as the respondent in this case has suffered. The principle, therefore, affords little guidance in the assessment of damages for the pain and suffering undergone and for the impairment which results from the injuries, and in fixing such damages the judge can do no more than endeavour to arrive at a fair estimate, taking into account all the relevant considerations.

The principle can, however, afford some guidance to the tribunal in assessing compensation for the financial loss resulting

[1] (1880) 5 App.Cas. 25, 39.

from an accident, and in such cases it has been referred to as "the dominant rule of law": see *per* Lord Wright in *Liesbosch (Owners)* v. *Edison (Owners)*.[2] There are, no doubt, instances to be found in the books of exceptional cases in which this dominant rule does not apply, as, for instance, in cases of insurance, or cases calling for exemplary or punitive damages, or in certain cases dealing with the loss of use of a chattel; but, as Lord Sumner said in *Admiralty Commissioners* v. *Chekiang (Owners)*[3]: "The measure of damages ought never to be governed by mere "rules of practice, nor can such rules override the principles of "the law on this subject."

It was argued for the respondent that no consideration of the tax which would have resulted had he not been prevented from earning the sums for the loss of which he claims compensation was legitimate, as this consideration was too remote. It was pointed out that the tax under Schedule D (which was the relevant schedule in this case) is not payable until some time after the money has been earned, and in no sense constitutes a charge on the moneys themselves. If the tax fell to be assessed under the system of P.A.Y.E. or under Schedule E, different considerations would arise, for in that case the tax would be deducted before the money was paid. I do not think that we should draw a distinction between cases in which the money is deducted before the payment of tax is made and those cases in which the tax falls to be paid after the money has been received.

It is a strange fact that until 1933 the question whether the tax position of the injured person should be taken into account in assessing damages had, so far as I can ascertain, never been raised. No doubt in the old days tax was so small that it may have been thought not worth while to take account of it. In the great majority of running-down cases the question would not have arisen and in those days the amount of damages was assessed by a jury under appropriate directions from the judge. However, for many years before 1933 the amount of tax had been assessed at a figure by no means negligible, and there is no record of the point ever having been raised.

The first case in which this question arose for decision was the case of *Fairholme* v. *Firth & Brown Ltd.*[4] That was a case in which a company had wrongfully dismissed their managing director. The damages were assessed at £18,000, and the issues for determination were (*a*) Whether any sum awarded to the plaintiff by way of damages would be subject to British income tax and/or surtax. (*b*) If not, whether this fact and the fact that the plaintiff would have been liable for income tax and surtax if the money had been paid under the agreement should be taken into account in assessing damages. Point (*a*) was not in fact argued, it being agreed by counsel on both sides that the damages would not be subject to tax; and accordingly du Parcq J. assumed, without deciding the point, that no tax would be exigible on the amount of the damages, and pointed out that this was the foundation for the argument on point (*b*). I express no opinion as to what the answer to point (*a*) would have been if it had been the subject of a judicial decision. There may well be a difference between actions for personal injuries and actions for wrongful dismissal in regard to the obligation of the plaintiff to pay tax on the amount of damages received, and cases on the one topic may therefore be a dangerous guide to follow on the other. du Parcq J., in the course of his judgment, said[5]: "I should be "reluctant to give a decision which would seek to alter an "inveterate practice unless I were convinced that the practice "is inconsistent with principle, and unjust, and I am not so "convinced in this case. On the contrary, I am of opinion that "it is right in principle, to have no regard, in assessing damages "as between master and servant, to the servant's liability to the "Crown, which is truly res inter alios acta."

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[2] [1933] A.C. 449, 463; 38 Com. Cas. 267; sub nom. *The Edison*, 49 T.L.R. 289.

[3] [1926] A.C. 637, 643; 42 T.L.R 634; 32 Com.Cas. 91.

[4] (1933) 149 L.T. 332; 49 T.L.R. 470.

The only ground, apart from the reference to inveterate practice upon which du Parcq J. based his judgment, rests upon the maxim res inter alios acta. I confess to some difficulty in defining the limits of this principle in cases concerning the assessment of damages in personal injury cases. The contract which the injured person has made, which gives him the right to the salary for the loss of which he claims to recover damages, may surely also be said to be res inter alios acta from the point of view of the wrongdoer, and yet this contract obviously forms the basis upon which damages for loss of earnings are to be assessed. In all such cases the real issue seems to be whether the facts relied upon as affecting the measure of damages are too remote to be taken into consideration.

The next case in which the point arose for decision was *M'Daid* v. *Clyde Navigation Trustees*.[6] In that case a workman was injured in unloading a vessel. He was in receipt of a weekly

[5] 149 L.T. 332, 333.

[6] 1946 S.C. 462.

wage from which tax was deducted under the P.A.Y.E. scheme. The question for determination was whether, in awarding damages for loss of earnings, the judge should have regard to the gross sum which the workman earned or to the net sum which was paid to him after payment of tax. Lord Sorn decided that the lower sum should be the factor to be taken into account in assessing damages. He said that, in his opinion, to ignore the tax position at the present day would be to act in a manner which was out of "touch with reality." He put the following case[7]: "Suppose the case of a pursuer whose potential earnings have "been proved at about £2,000 a year. Suppose, further, that he "has already lost one year's work, and that the medical evidence "establishes that he may be expected to lose another before "becoming fit to resume. Is the pursuer's counsel entitled to "ask the presiding judge for a direction to the jury that, in "making good this loss of income to the pursuer, they must not "take into account the fact that he would have had to pay tax "upon it? With income tax at 10s. in the £ (to say nothing of "surtax) such a direction would seem to a jury just like telling "them to give the pursuer twice the amount of his loss, and it "is difficult to suppose that such a direction, apparently ignoring "realities, could be received or given with any sense of satisfac- "tion. It seems to me that, when you get a liability to which "all earnings are subject and which depends not upon any "circumstances peculiar to the individual but upon a general law "of the land universal in its application, it would be wrong to "ignore the existence of that liability." The attention of Lord Sorn was not called to *Fairholme's* case.[8]

In 1946 a similar question arose before Atkinson J. in *Jordan* v. *Limmer & Trinidad Lake Asphalt Co. Ltd.*[9] That learned judge followed the decision in *Fairholme's* case.[10] It does not appear that *M'Daid's* case[11] was brought to his attention. The cases of *Fairholme*[10] and *Jordan*[12] were followed and applied in a case arising in South Australia (*Davies* v. *Adelaide Chemical and Fertilizer Co. Ltd.*[13]).

Shortly afterwards Lord Keith in *Blackwood* v. *Andre*[14] decided that no deduction should be made from the amount awarded in respect of loss of earnings on the ground that these

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[7] 1946 S.C. 462, 464.

[8] 149 L.T. 332.

[9] [1946] K.B. 356; 62 T.L.R. 302; [1946] 1 All E.R. 527.

[10] 149 L.T. 332.

[11] 1946 S.C. 462.

[12] [1946] K.B. 356.

[13] [1947] S.A.S.R. 67.

[14] 1947 S.C. 333.

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earnings would have been liable to income tax. Lord Keith expressed his disagreement with the reasoning of Lord Sorn in *M'Daid's* case.[15] He gave his reasons for disagreeing in the following terms [16]: " The basis upon which the argument proceeds " is that a pursuer is entitled to restitution as far as possible of " the loss which he has sustained as the result of the injury for " which the defender is liable. The suggestion is that what he " has lost is only the net sum which he would receive after the " deduction of income tax. That argument has a certain speciousness, particularly if tax is regarded as tax deducted at the " source. It must be remembered that not all tax is deducted " at the source and that the same argument would apply to a " person who received certain income for which he had himself " to account to the Revenue, but, apart altogether from that, the " consideration appears to me to be quite an illegitimate one. It " would apply on the same grounds where a person had come " under obligation to pay a proportion of his income away to " somebody else. The fact that he would then be left with a " net sum does not appear to me to be any reason for basing " the assessment of damages upon the net sum which he would " receive or retain and not upon the gross sum which should be " paid to him and from which he would make the conventional " deduction to which he had become bound. Further, the argument seems to ignore the fact that the only person who is going " to benefit is the person who is liable in damages. There is " no suggestion that he will account to the Revenue for the " capitalized income tax which ex hypothesi has been taken into " account in assessing damages. The court, in my opinion, has " no concern with the incidence of taxation in assessing the " damages of an injured taxpayer. The argument rests upon a " consideration of facts that really are res inter alios acta, and for " these reasons the argument must, in my opinion, be rejected."

There being this difference of opinion between the judges of first instance, the matter came before the Court of Appeal in *Billingham* v. *Hughes*.[17] That was a case in which a doctor had been knocked down and seriously injured by an army vehicle and was thus prevented from continuing his activities as a general practitioner. The court decided that the fact that the plaintiff would have been liable to pay tax in respect of the income which he would have earned but for the accident ought to be disregarded in assessing damages. The question whether a similar result should follow if the tax was payable under the P.A.Y.E. scheme as in *M'Daid's* case [18] was left open.

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[15] 1946 S.C. 462.

[16] 1947 S.C. 333–334.

[17] [1949] 1 K.B. 643; 65 T.L.R. 246; [1949] 1 All E.R. 684.

Our attention was also called to the case of *Comyn* v. *Attorney-General.*[19] This was a case in which the question arose as to the compensation for compulsory acquisition of property. It was therefore necessary for the court to determine the fair valuation of a capital asset. In such a case I should have thought it questionable whether a reduction of the amount to be paid as compensation for that capital asset based on the prospective tax liability of its owner was in accordance with the true principle of valuation. In *W. Rought Ltd.* v. *West Suffolk County Council* [20] the Court of Appeal had to consider whether or not, in claiming compensation for loss of profit in respect of specific orders during the interruption of manufacturing operations, regard should be had to the tax which the company in question would have had to pay had they been enabled to complete these orders. It was assumed that the company would have been liable to pay tax in respect of the profit earned on these contracts, and it was further assumed that the compensation awarded would not be liable to tax. It was held that it was not legitimate to make any deduction from the compensation awarded for loss of profits by any consideration of the company's possible tax liability. The facts in *Rought's* case [20] were widely different from those in the present case and it is not necessary for the present purpose to express any final opinion on either *Rought's* case [20] or *Comyn's* case.[21]

I have now referred to all the relevant authorities bearing on the point and the question remains whether the *Billingham* case,[22] which the trial judge and the Court of Appeal in this case followed, was rightly decided.

My Lords, it is, I think, if I may say so with the utmost respect, fallacious to consider the problem as though a benefit were being conferred upon a wrongdoer by allowing him to abate the damages for which he would otherwise be liable. The problem is rather for what damages is he liable? and if we apply the dominant rule, we should answer: "He is liable for such damages "as, by reason of his wrongdoing, the plaintiff has sustained." I cannot think that the risk of confusion arising if the tax position be taken into consideration should make us hesitate to apply the rule of law if we can ascertain what that rule is. Nor should we be deterred from applying that rule by the consistent or inveterate practice of the courts in not taking the tax position into consideration in those cases in which the courts were never invited to do so.

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[18] 1946 S.C. 462.

[19] [1950] I.R. 142.

[20] [1955] 2 Q.B. 338; [1955] 2 All E.R. 337.

[21] [1950] I.R. 142.

[22] [1949] 1 K.B. 643.

My Lords, I agree with Lord Sorn in thinking that to ignore the tax element at the present day would be to act in a manner which is out of touch with reality. Nor can I regard the tax element as so remote that it should be disregarded in assessing damages. The obligation to pay tax—save for those in possession of exiguous incomes—is almost universal in its application. That obligation is ever present in the minds of those who are called upon to pay taxes, and no sensible person any longer regards the net earnings from his trade or profession as the equivalent of his available income. Indeed, save for the fact that in many cases—though by no means in all cases—the tax only becomes payable after the money has been received, there is, I think, no element of remoteness or uncertainty about its incidence.

Counsel for the appellants in the course of his argument put the case of two men each enjoying a salary of £2,500 a year, the one as a servant of an international body being exempted from all tax on his salary, the other having to pay income tax and surtax in the ordinary way. He pointed out that if each of these men met with an accident and each was deprived of a year's salary, for which he succeeded in recovering damages, it would be quite unreal to treat them as though they were in receipt of the same salary; for, in the absence of special and unusual circumstances, the one whose income was tax free would enjoy an income almost double the income of his fellow who had to pay taxes. My Lords, I agree with this contention. I see no reason why in this case we should depart from the dominant rule or why the respondent should not have his damages assessed upon the basis of what he has really lost, and I consider that in determining what he has really lost the judge ought to have considered the tax liability of the respondent.

It would, I think, be unfortunate if, as the result of our decision, the fixation of damages in a running-down case were to involve an elaborate assessment of tax liability. It will no doubt become necessary for the tribunal assessing damages to form an estimate of what the tax would have been if the money had been earned, but such an estimate will be none the worse if it is formed on broad lines, even though it may be described as rough and ready. It is impossible to assess with mathematical accuracy what reduction should be made by reason of the tax position, just as it is impossible to assess with mathematical accuracy the amount of damages which should be awarded for the injury itself and for the pain and suffering endured.

In the present case the judge has made an elaborate and detailed survey of the position and has fixed two sums; and it was agreed between the parties that we should award as damages one or other of these sums. We were, therefore, in no way concerned to consider the precise method which the trial judge employed in arriving at these figures. In my opinion, under these circumstances we should substitute the sum of £6,695 for the sum of £37,720.

For the reasons I have given I would allow this appeal and reduce the amount of damages to be recovered by the respondent from £47,720 to £16,695. Allowance must, of course, be made for the sum of £7,000 which has already been paid.

It has been agreed that the appellant should pay the costs of this appeal.

Lord Goddard. My Lords, on September 21, 1951 the respondent to this appeal was gravely and permanently injured in a railway accident for which it is conceded the appellants must accept liability. The respondent was a partner in a firm of civil engineers: he was and is eminent in his profession and was earning a large professional income. Until some time in the year following the accident he was unable to take any effective part in the business of the firm. On his return to work, on account of his physical condition a reduction was made in the apportionment of the profits he was entitled to receive, and the learned trial judge also found that the earnings of the partnership were likely to be reduced in the future owing to his inability to take a full part in the business. It is unnecessary to set out the provisions of the original partnership deed and the subsequent alterations agreed upon owing to the respondent's disability, because the sums awarded by the learned judge under the various heads of damage are accepted by the parties, and the sole question raised in this appeal is whether, in assessing the loss of income up to the date of trial and the prospective future loss, the tax paid on his income, or which would have had to be paid, had it been earned, is to be taken into account. For pain and suffering, loss of amenities and actual out-of-pocket expenses incurred or to be incurred the respondent was awarded £10,000, and no question arises as to this amount, which would not in any case be subject to tax. On the basis that income tax and surtax are to be ignored, Pearce J. awarded the respondent £37,720 in respect of the loss of earnings to the date of the trial and his prospective future loss. He then in the course of a full and careful judgment set out the sums he would award if he had to take the tax position into account. He found that in that event the sum would be £6,695. Holding that he was bound by the decision of the Court of Appeal in *Billingham* v. *Hughes* [23] to ignore all questions relating to tax, he entered judgment for a total of £47,720 less £7,000 already paid by the appellants on account. The alternative sum found by the learned judge was accepted by the parties, and it is conceded by the appellants that this case is indistinguishable from *Billingham* v. *Hughes*,[23] so the question for your Lordships is whether or not that case was rightly decided. The parties agreed that under the present law no part of the sum awarded as damages was subject to income tax or surtax, and the appeal proceeded on this footing.

It is remarkable how little authority there is on this subject. It has never been before this House, nor does there seem to be any decision in the appellate courts of the other Commonwealth countries or of the United States of America on the matter. The first reported case in which it appears to have been raised is *Fairholme* v. *Firth & Brown Ltd.*,[24] where du Parcq J. decided that no deduction of tax on earnings was to be made; and this was followed by Atkinson J. in *Jordan* v. *Limmer & Trinidad Lake Asphalt Co. Ltd.*[25] In assessing in the latter case the amount of wages lost by an injured plaintiff, the learned judge refused to take into account the weekly amount deducted for tax commonly referred to as P.A.Y.E. Both these cases were considered and approved by the Court of Appeal in *Billingham* v. *Hughes*.[26] There have been two cases in the Court of Session on this subject. In the first, *M'Daid* v. *Clyde Navigation Trustees*,[27] the Lord Ordinary decided that the incidence of tax should be taken into account, while in *Blackwood* v. *Andre* [28] Lord Keith, as Lord Ordinary, came to the same conclusion as had du Parcq and Atkinson JJ. That the contention now put forward by the appellants was never raised before 1933 despite the heavy taxation that had obtained since the first war is no doubt a point in favour of the respondent. "Communis opinio," said Lord Ellenborough C.J. in *Isherwood*

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[23] [1949] 1 K.B. 643.
[24] 149 L.T. 332.
[25] [1946] K.B. 356.
[26] [1949] 1 K.B. 643.
[27] 1946 S.C. 462.
[28] 1947 S.C. 333.

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v. *Oldknow*,[29] "is evidence of what the law is," and it would certainly appear as if the opinion of the profession and of those specially affected by these matters, like insurance companies, was that tax should be left out of account in the assessment of damages. At the same time it must be remembered that in very many, I think it may be said in most, accident cases the plaintiffs are persons whose tax liability would make but little difference to the amounts awarded, and taxation is now far higher than it was before the last war. Moreover, the sums awarded in these cases are generally on a considerably higher scale than formerly. This is no doubt partly due to the fall in the value of money, but at least in road accident cases fast-moving motor-cars are apt to inflict much greater damage than did horse-drawn vehicles. Probably the highest sum ever awarded in an accident case in the last century was £16,000 which Dr. Phillips was awarded against the London & South Western Railway Co. in 1879. (*Phillips* v. *London & South Western Railway Co.*[30]) In those happy days the income tax was 3d. in the £ and there was no surtax. With income tax and surtax at present rates and with damages on the high scale that so often has to be applied nowadays, the question of principle raised in the present case is one of the greatest importance.

In an action for personal injuries the damages are always divided into two main parts. First, there is what is referred to as special damage, which has to be specially pleaded and proved. This consists of out-of-pocket expenses and loss of earnings incurred down to the date of trial, and is generally capable of substantially exact calculation. Secondly, there is general damage which the law implies and is not specially pleaded. This includes compensation for pain and suffering and the like, and, if the injuries suffered are such as to lead to continuing or permanent disability, compensation for loss of earning power in the future. The basic principle so far as loss of earnings and out-of-pocket expenses are concerned is that the injured person should be placed in the same financial position, so far as can be done by an award of money, as he would have been had the accident not happened, and I will endeavour to apply this in the first place to the special damage claimed in respect of loss of earnings. Hitherto the decisions, other than that of Lord Sorn in *M'Daid* v. *Clyde Navigation Trustees*,[31] have treated the incidence of tax on a man's earnings as res inter alios acta. This expression in this context is, I think, misleading. A plaintiff may seek to increase or a defendant to diminish damages by items which are held to be too remote. The mere fact that the item arises as between the plaintiff and a third party would not seem to be the test. In a wrongful dismissal or personal injuries action the fact that a plaintiff has obtained remunerative employment with a third party is normally relevant, though it would fall within the words res inter alios acta. The question is whether taxation is or is not too remote to be taken into account. A plaintiff claims loss of earnings because he has been prevented from fulfilling a contract of service or earning wages or, if a professional man, earning fees from clients or, if a trader, from dealing with customers. Tax is imposed by law; the State exacts a certain proportion of income which varies with the amount of the taxable income. There is a standard rate of income tax, but there are allowances, and no one pays the standard rate of each pound of his income. Surtax is graded according to the amount of income. The taxpayer must pay and, in my opinion, it cannot make any difference whether he receives the gross income and pays his tax later, as he does if assessed under Schedule D, or whether it is deducted before he receives it, as is the case with tax under Schedule E or P.A.Y.E. In either case to say that a taxpayer has the benefit of his full income is, in my opinion, to be "out of touch with reality," to use the words of Lord Sorn in *M'Daid's* case.[32] As he said,[32] when income tax was 10s. in the £ to award him damages without regard to tax would give him, subject to statutory allowances, just double the amount of his loss. The simplest case to take, no doubt, is that of a person assessed under Schedule E. A certain salary is attached to the office, but that which he will receive is, at the present rate of taxation, the salary less a very substantial percentage, which is deducted for tax before payment. If, therefore, he is disabled by an accident from earning his salary, I cannot see on what principle of justice the defendants should be called upon to pay him more than he would have received if he had remained able to carry out his duties. A taxpayer assessed under Schedule D can, no doubt, make provision for payment as he pleases. It may be, from time to time, he has to sell capital to enable him to pay his tax if he has spent his income before the tax becomes due, but I cannot see any principle upon which the amount he is to receive as damages should depend upon whether he is assessed under one Schedule or another. Though the tax is not payable till a year after the income is earned, the liability, which is common to all except those who by reason of the smallness of their income are exempt altogether, always remains and must be discharged. Damages which have to be paid for personal injuries are not punitive, still less are they a reward. They are simply compensation, and this is as true with regard to special damage as it is with general damage.

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[29] (1815) 3 M. & S. 382, 396–397.

[30] (1879) 5 C.P.D. 280.

[31] 1946 S.C. 462.

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[32] 1946 S.C. 462, 464.

As a result of allowing this appeal the damage claimed for loss of earnings must be the sum of £4,945, and for future earnings £1,750, this being the sum which the trial judge awarded on the basis of the figures agreed by the parties if tax had to be taken into account. We were not informed what the calculations were which had resulted in this figure. But in considering special damage in these cases the rate of tax to be taken must, as it seems to me, be the effective rate of income tax, and, if necessary, surtax, which would have been applicable to the sums in question if they had been earned. That rate depends on the combination of a number of factors that may vary with each case—allowances, reduced rates, surtax rates, other income of the claimant or his wife, charges or reliefs. The task of determining it may not always be an easy one, but in complicated cases it is to be hoped that the parties, with the help of accountants, will be able to agree figures. If not, the court must do its best to arrive at a reasonable figure, even though it cannot be said to be an exact one.

The assessment of general damages in these cases is always a matter of difficulty. I do not think that restitutio in integrum has any application to general damages. The plaintiff receives compensation and not restitution. If he has lost an eye or a limb he can be compensated by money, but that will not restore what he has lost. So, too, if his earning capacity is lessened or destroyed, the loss cannot be measured so as to ensure that he is no worse off in the future than he was in the past, and, indeed, if it turned out that the amount of his disability was less than was anticipated at the trial, he might even be overcompensated. On this matter I would quote Lord Dunedin in *Admiralty Commissioners* v. *Susquehanna (Owners)*[33]: "If the "damage be general, . . . the quantification of such damage is "a jury question. . . . For a jury question no rigid rules, or rules "that apply to all cases, can be laid down, but in each set of "circumstances certain relevant considerations will arise which, "were the matter before a judge, it would be the duty of the "judge in the case to bring before the jury." A judge sitting

[33] [1926] A.C. 655, 661–662; 42 T.L.R. 639.

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without a jury must act on the same principles and bear in mind the same considerations as he would direct a jury to do as to the fair amount to award both for pain and suffering and for loss of earning capacity, and I think it would be well to remember that it has always been laid down that damages cannot be a perfect compensation. Lord Wensleydale, when one of the judges of the King's Bench, as he was for six years, so charged the jury in *Armsworth* v. *South Eastern Railway Co.*,[34] and his direction was approved by the Exchequer Chamber in *Rowley* v. *London & North Western Railway Co.*[35] In cases where surtax is payable and the rate has been affected by private income, the nature of that private income will be relevant. If it is a life annuity under a will or settlement it may well be expected to continue. If it is disposable investments which might be sold at any time or transferred to a child, less, perhaps little, regard should be had to it. Apart from this surtax complication, I think I should direct a jury somewhat in this way: "You know what the plaintiff was earning before the accident "and what he had left to support himself and his family after "tax was paid. You know his age. It is for you to consider for "how long he would be likely to earn at the present rate. If he is a "member of a partnership, take into consideration his position in "the firm at the time of the accident. If a junior partner you "may well think that his earnings would have increased as time "went on, while if a senior partner they might well decrease as "he ceases to give the same amount of time to the business of "the firm. Remember that whatever he earned would be subject "to tax, and that you will already have in mind when assessing "his pre-accident income. No one can foresee whether tax will "go up or down, and I advise you not to speculate on the subject "but to deal with it as matters are at present. You cannot tell "what his health would have been had he not been injured nor "what fortune, good or bad, he might have met with. You know "he had, when he was injured, a spendable income of so much" (adding if the plaintiff was in partnership: "You have heard the "provisions of his partnership deed providing for an alteration "in the shares and you may consider whether his injury may "affect the earnings of the partnership"). "Taking all these "matters into consideration, you will consider what is fair that "a man of this age should receive in respect of the amount of "disability which you find this accident has imposed upon him, "remembering also that what you give is given once and for all."

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[34] (1847) 11 Jur. 758.

[35] (1873) L.R. 8 Ex. 221.

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My Lords, I do not pretend that such direction is scientific, and there may well be other considerations in particular cases of which to remind oneself or a jury, but generally damages must be decided by the application of reasonable common sense. The principles set out above would be applicable in wrongful dismissal actions in which the court has to calculate damages for loss of earnings which would have been subject to tax had they been earned. It was suggested that the principles might apply in certain computations of compensation under compulsory purchase orders. We were referred to an Irish case, *Comyn* v. *Attorney-General*,[36] and *W. Rought Ltd.* v. *West Suffolk County Council*.[37] In this opinion I am dealing solely with damages in personal injury and wrongful dismissal cases. In the present case all we are concerned with is whether in calculating the damage the incidence of tax should be taken into account and whether it is an element to be considered in assessing general damage. In my opinion, it is, and I would therefore allow the appeal and vary the judgment of Pearce J. by substituting the sum of £16,695 for that of £47,720, directing that credit be given for the sum of £7,000 already paid by the appellants. The costs are the subject of agreement between the parties and no order need be made concerning them.

LORD REID. My Lords, the respondent was very seriously injured in a railway accident on September 21, 1951, for which the appellants admit liability. He was senior partner in a firm of civil engineers and before the accident he was earning a very large income. Although he was 65 years of age he made a remarkable recovery. He is still very much handicapped, but he is able to carry on his professional work, though on a reduced scale. His earnings have been much reduced, but he still earns a large income, and damages have been assessed on the basis that he will probably be able to continue to do that for a number of years.

The action was tried in March, 1954, and Pearce J. awarded a sum of £47,720 as damages. Authorities binding on him and on the Court of Appeal required him to assess damages on the diminution of gross income suffered and to be suffered by the respondent as a result of the accident, and to leave out of account the incidence of income tax and surtax. The appellants, wishing to bring this matter before this House, requested Pearce J. to analyse his award and to make alternative findings of the sums which he would have awarded if the incidence of income tax and surtax were taken into account. The learned judge did this and all his assessments are accepted as correct. In respect of out-of-pocket expenses, pain and suffering and loss of amenities (including the fact that the respondent now requires the assistance of a manservant) he awarded £10,000; and there is no appeal against that part of his award. In respect of actual loss of earnings before the end of 1953 he awarded £15,220 if the incidence of tax is not taken into account, and found that in respect of those additional earnings the respondent would have had to pay £10,275 more in income tax and surtax: he therefore awarded £4,945 if those taxes have to be taken into account. In respect of estimated future loss of earnings he awarded £22,500 if tax is not to be taken into account, but only £1,750 if tax is to be taken into account. That great disparity is accounted for by the fact that in spite of his serious handicap the respondent will still receive a large share of the profits of his firm, so that he will probably still pay surtax at the highest rate. The result is that if this appeal succeeds the respondent's damages will be £16,695. It is not disputed that, whatever sum is awarded as damages, it will not be subject to income tax or surtax.

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[36] [1950] I.R. 142.

[37] [1955] 2 Q.B. 338.

Leaving aside the award of £10,000, which is not challenged, the question before your Lordships is whether the appellants must pay £37,720 based on neglecting the incidence of tax or £6,695 based on taking that into account. As regards loss of earnings suffered before the end of 1953, it is an ascertained fact that if the respondent had earned the additional sum of £15,220 he would only have benefited from that to the extent of £4,945 because he would have had to pay the rest in tax. £4,945 represents his real loss for that period. Prospective loss in respect of future earnings can never be a matter of exact calculation, whether one takes gross earnings or the net benefit to the plaintiff remaining after allowing for additional tax liability. But it is accepted in this case that £22,500 is a fair estimate of the present value of the respondent's future loss of gross earnings and that £1,750 is a fair estimate of the present value of the net benefit which he would have retained after paying tax. So, although the respondent has been awarded £37,720 in respect of loss of earnings caused by the accident, in fact if the accident had not happened he would only have been better off in this respect to an extent represented by an award of £6,695.

It is true that there are several authorities and a long course of practice against taking tax liability into account in assessing damages, but this is not the type of case in which vested interests may have accrued or in which people may have ordered their affairs relying on the validity of existing practice. In my opinion, this is a case in which it is proper for your Lordships to consider the question on its merits as one of principle.

The general principle on which damages are assessed is not in doubt. A successful plaintiff is entitled to have awarded to him such a sum as will, so far as possible, make good to him the financial loss which he has suffered and will probably suffer as a result of the wrong done to him for which the defendant is responsible. It is sometimes said that he is entitled to restitutio in integrum, but I do not think that that is a very accurate or helpful way of stating his right. He cannot in any real sense be restored, even financially, to his position before the accident. If he had not been injured he would have had the prospect of earning a continuing income, it may be, for many years, but there can be no certainty as to what would have happened. In many cases the amount of that income may be doubtful even if he had remained in good health, and there is always the possibility that he might have died or suffered from some incapacity at any time. The loss which he has suffered between the date of the accident and the date of the trial may be certain, but his prospective loss is not. Yet damages must be assessed as a lump sum once and for all, not only in respect of loss accrued before the trial, but also in respect of prospective loss. Such damages can only be an estimate, often a very rough estimate, of the present value of his prospective loss.

But the general principle is subject to one qualification. A loss which the plaintiff has suffered, or will suffer, or a compensatory gain which has come or will come to him following on the accident, may be of a kind which the law regards as too remote to be taken into account. In my judgment, the real question in this case is whether the plaintiff's liability to pay taxes is something which the law must regard as too remote when determining or estimating what he has lost as a result of the accident. The defendant is only bound to pay damages based on an assessment of the plaintiff's actual and prospective loss taking into account all those factors which are not in law too remote.

It has sometimes been said that tax liability should not be taken into account because it is res inter alios. That appears to me to be a wrong approach. Let me take the case of a professional man who is injured so that he can no longer earn an income. Before his accident he earned fees and he paid rent and rates for his office, the salaries of clerks, the expenses of running a car and other outgoings and he would have continued to do so if he had not been injured. Apart from one matter to which I shall refer later, I cannot see why these expenses are any less res inter alios than his payments of income tax in respect of his net earnings. Indeed, he could not avoid liability to pay tax, but he might have been able to diminish his outgoings if he had chosen to spend more time and effort himself on his work or in travelling in the course of his work. Yet no one would suggest that it is improper to take into account expenditure genuinely and reasonably incurred or that the plaintiff's damages should be assessed on the fees which he would have continued to receive without regard to the outgoings which he would have continued to incur.

In *Billingham* v. *Hughes*,[38] the leading authority on which the respondent relies, I think that this fact was not fully appreciated. For example, it was said that the doctor in that case was entitled to restitutio vis-à-vis his patients, i.e., to receive his fees in full, but it cannot have been intended that his outgoings should be disregarded in assessing damages. And it was also said that a man's income is his own to do what he likes with it and that the defendant has no concern with what happens to his income. But that argument goes much too far. The gross fees which the doctor receives are his own to do what he likes with them. He is not bound to spend them in paying his rent or rates or other outgoings any more than he is bound to spend them in paying his taxes. But if he does not meet any of these obligations either out of his fees or from some other source he will ultimately be made bankrupt. The defendant has no more concern with whether or how he pays his rent than with whether or how he pays his taxes. What the defendant is concerned with is how much the plaintiff has lost.

In a case where the wrongdoer is the plaintiff's employer it has sometimes been said that he would have had to continue to pay the plaintiff's full wages or salary if there had been no accident or wrongful dismissal, so why should he take advantage of his own wrong to diminish his liability? That argument has lost some of its force since the introduction of the system of P.A.Y.E., but it would be strange if the introduction of a new method of collecting tax altered the legal position and, in any event, the argument would remain for surtax. The real answer is, I think, that before the wrong the employer was paying for the plaintiff's services, whereas now he is paying the plaintiff's loss and he will have to pay someone else to perform the services. And this argument would also go too far if valid, for it would seem to involve the proposition that, if a dismissed employee gets other work, the employer ought not to be able to take advantage of that.

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[38] [1949] 1 K.B. 643.

I return to the question whether the fact that the plaintiff now has to pay less tax than he would have done is a factor too remote to be taken into consideration. Taxation is not something purely personal to the plaintiff. The obligation arises from Acts of Parliament and applies to all, and if those Acts directly related the amount of tax to the amount of income I should have no doubt about the matter at all. My only difficulty arises from the fact that the exact amount by which the plaintiff's liability for tax has diminished may depend, and sometimes largely depend, on other matters besides the amount of the diminution of his earned income. Let me take, for example, a man with an earned income of £1,000 per annum, and suppose that he has an unearned income of £2,000 or that his wife has an income of £2,000 per annum. If by reason of an accident he can no longer earn an income his future tax liability is diminished by a much greater amount than it would have been if his only income had been the £1,000, and therefore his real loss is less than it would have been in that case. Other instances could be taken, but the difficulties are similar to those in the case which I have supposed.

I do not think that it is possible to formulate any principle by which it can be determined what is and what is not too remote. Mayne on Damages, 11th ed., p. 151, refers to "matter "completely collateral," and for a general description of what is too remote I cannot find better words, but I do not think that every case can be solved merely by applying those words to it. Taking this description, however, and applying it to the present case, I do not think that the plaintiff's personal position is completely collateral. It is not something brought in as a separate factor, but only something which helps to quantify an obligation which is imposed by an Act of Parliament as a consequence of earning income, and I cannot regard that obligation as in itself collateral—certainly not completely collateral.

Another element to be considered is whether bringing in the matter of liability to tax would seriously increase the duration and expense of trials; for practical as well as theoretical considerations weigh in determining what is too remote. But I do not think that there would be serious practical effects. In the great majority of cases the matter would be simple, and even in more complicated cases it would not cause very much difficulty. It has caused little difficulty in the present case. No doubt some detailed examination is, or may be, necessary as regards actual loss suffered between the date of the accident and the date of the trial, but, as regards prospective loss, examination in full detail would be of little assistance, and, indeed, would generally not be possible, because, as I have said, there can only be an estimate of loss of future earnings, and there can only be an estimate of the plaintiff's other future income, and therefore there can only be an estimate, and probably only a rough estimate, of what the future tax position of the plaintiff would have been and will be. In considering the importance of practical difficulties I would weigh them against the importance of the element of tax liability, with tax at modern levels, in determining the real loss which the plaintiff has suffered. I cannot find any sufficient reason, theoretical or practical, for excluding the element of tax liability, and I am therefore of opinion that this appeal should be allowed.

Lord Radcliffe. My Lords, I have had an opportunity of considering in advance the speech of my noble and learned friend, Lord Goddard. I agree with it, as I agree with the motion which is to be proposed.

Lord Tucker. My Lords, having now heard this point argued three times—twice in your Lordships' House and once in the Court of Appeal—I am persuaded that the decision in *Billingham* v. *Hughes*,[38] to which I was a party in the Court of Appeal, was erroneous.

I agree that the phrase res inter alios acta does not assist in the solution of the problem, but the difficulty is, I feel, in deciding what items of expenditure following the earning of profits are to be taken into consideration and which are to be ignored. Such items are clearly distinguishable from those which are incurred in the process of earning the profits and which have to be deducted in the computation thereof. I think the true answer is that expenditure which—although not actually a charge on earnings—is imposed by law as a necessary consequence of their receipt, is relevant to the ascertainment of the loss suffered by the party injured.

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[38] [1949] 1 K.B. 643.

In the present case the figures have been agreed and have been set out by the trial judge in detail in a manner which has been most helpful, but it should not, I think, be assumed that your Lordships are giving tacit approval to the sums awarded under the different heads or to the method of arriving at them. Nor should it be thought that it is always incumbent upon judges who have to apply your Lordships' decision in the present case to itemize the damages they award in such detail. I agree that the appeal succeeds.

Lord Keith of Avonholm. My Lords, after listening to the full and able arguments for both sides in this case, I have considered afresh the opinion I expressed in *Blackwood* v. *Andre*.[39] With some regret, knowing the views of your Lordships, I have found myself unable to change my opinion. I propose to explain my reasons very briefly.

I feel great difficulty in the view that the incidence of taxation on an injured taxpayer should be any concern of the wrongdoer and should be used to minimize an award of damages in his favour. To many it may seem somewhat hard that the more tax a man has paid before he meets with an accident the less damages relatively will he recover from the person who has injured him. Two men each earning £2,000 a year are injured in the same accident and are totally disabled for life. A has income from investments of £5,000 a year, or a wife with income of that amount, B is a single man with no independent income. It would be no answer for the wrongdoer to say, A has got a wealthy wife, or a large independent income, and therefore he does not need, and ought not to recover, any damages except for pain and suffering, loss of amenities and out-of-pocket expenses. The law would say the wealthy wife and the independent income are not his concern. But by taking net income after payment of tax as the measure of damages the wrongdoer achieves by a back door precisely what is refused to him by the direct entrance. In such an event B will receive full compensation for loss of his earning capacity of £2,000 a year so far as judge or jury with the limitations of human foresight and possibilities of human error can assess it. A will receive insignificant and some may think derisive damages for loss of exactly the same income. I do not ignore the fact that B may need the damages more than A and the difference may seem to introduce a measure of equity as between A and B, to the advantage of the wrongdoer, but the law has not yet reached the stage of assessing damages for a legal wrong on the basis of need.

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[39] 1947 S.C. 333.

The whole issue in this case boils down to the question whether a man is to be compensated for loss of wage-earning capacity on the basis of gross earnings, or net earnings after deduction of tax. The first alternative provides a simple rule which has been adopted for generations and creates the minimum of trouble. The second alternative must, I think, give rise to serious difficulties and complications. Nor is the matter confined to British income tax. It was conceded in argument and is, I think, inevitable that under the second alternative, if a foreigner is injured in this country the courts will have to pay regard to the incidence of his foreign income tax, if any. It is a strange turn of fortune's wheel that the intricacies and accidents of fiscal legislation should have its repercussions in the assessment of damages in the civil courts.

Nor does the matter end there. A man may be content to earn a large income with a high rate of tax, with a view to prospective benefits or advantages. He may propose to make payments under covenants to relatives and others, with consequent taxation reliefs, or to maintain and possibly increase insurance premiums on life and endowment policies, or be content to enjoy the minimal benefits of earning a large salary under a system of high taxation with a view to enjoying in retirement a better pension. To take account of his existing tax position at the date of the accident will make no allowance for these contingencies. They may be very real intentions the opportunity of realizing which may depend on a man's maintaining his earning capacity. It may be said they can be taken account of by judge or jury. If so, new and difficult factors will be introduced into the computation of damages which would be unnecessary if damages were assessed on the basis of gross earnings.

There is, I think, a deceptive simplicity in looking at the matter from the point of view of loss of earnings down to the date of trial. It is, of course, obvious that if the injured man had been able to work he would have paid tax on his earnings, and it is attractive to say that his damages for ascertained loss of earnings should be calculated on net earnings after deduction of tax. But if an award of damages for loss of earnings is not subject to tax, to deduct tax before assessing damages seems to me singularly like exercising taxing powers in an indirect way. It must be remembered also that income tax is an annual tax imposed by the will of Parliament. To fix damages on an

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estimate of future taxation is impossible and to assess them de futuro on the basis of existing taxation savours of legislation by the judiciary. Further, to fix them on the basis of existing taxation without any knowledge of what the future commitments and obligations and personal status of the injured person will be, or would have been, seems to me to be unreal. On all counts the safe and simple rule, in my opinion, is to exclude the element of taxation from the assessment of damages. If there is a case for thinking that assessing damages on a basis of gross earnings in actions for personal injuries, or for wrongful dismissal, enables the individual to escape his fair contribution to the national revenue, the position, in my opinion, should be rectified by legislation.

I would dismiss the appeal.

LORD SOMERVELL OF HARROW. My Lords, I agree with the opinion which has just been delivered by my noble and learned friend, Lord Goddard, and there is nothing which I wish to add to it. I agree that the appeal succeeds.

Appeal allowed.

Solicitors: *H. M. B. Gilmour; Wilkinson, Howlett & Moorhouse.*

F. C.

[HOUSE OF LORDS.]

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1955
Oct. 17, 18; *Dec.* 12.

ESSO PETROLEUM CO. LTD. . . . APPELLANTS;

AND

SOUTHPORT CORPORATION . . . RESPONDENTS.

Shipping—Collision, etc.—Stranding—Public navigable river—Ship refloated by jettison of oil—Damage to foreshore by oil—Action by foreshore owners against shipowners—Claim based on trespass, nuisance and negligence of owner's servants—Suggestion of faulty steering gear made at trial—Not pleaded—Res ipsa loquitur—Onus of proof.

Shipping—Nuisance. Negligence—Onus of proof—Res ipsa loquitur. Trespass—Indirect act. Nuisance. Practice—Pleadings—Omission —Reliance on, not pedantry. Admiralty—Assessor—Shipping—Admiralty question in Queen's Bench Division—Need for assessor. Practice—Assessor.

An oil tanker was stranded in a river estuary and, to prevent her breaking her back, the master jettisoned 400 tons of her oil cargo which the tide carried to a foreshore, occasioning damage.

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* *Present*: EARL JOWITT, LORD NORMAND, LORD MORTON OF HENRYTON, LORD RADCLIFFE and LORD TUCKER.

The foreshore owners brought against the shipowners an action based on trespass, nuisance and negligence, alleging that the stranding was caused by faulty navigation; the defence denied negligence. At the hearing the shipowners' case was that the stranding was due to the tanker's stern frame being cracked so that the steering gear was faulty, but they called no evidence to show how this condition was caused. The trial judge held that they were not negligent as alleged in the statement of claim and that the foreshore owners were not entitled to succeed either in nuisance, trespass or negligence. The Court of Appeal held that the doctrine of res ipsa loquitur applied, and that the onus was on the shipowners to explain why the steering gear went wrong and that, as they had not done so, they were liable in negligence. On appeal to the House of Lords it appeared to be common ground that there would be a good defence in any event unless negligence was established:—

Held, that since every allegation in the statement of claim was rightly decided by the trial judge in a sense adverse to the foreshore owners, who had made no allegation of unseaworthiness, the shipowners could not be held responsible because they did not negative a possible case which was not alleged against them in the pleadings.

The Merchant Prince [1892] P. 179; 8 T.L.R. 430 distinguished.

Per Lord Radcliffe. I share the view of Denning L.J. that the shipowners were not responsible for a private nuisance in any ordinary sense.

Semble, *per* Lord Radcliffe and Lord Tucker, trespass did not lie at all on these facts.

Decision of the Court of Appeal (sub nom. *Southport Corporation* v. *Esso Petroleum Co. Ltd.* [1954] 2 Q.B. 182; [1954] 2 All E.R. 561) reversed.

APPEAL from the Court of Appeal (Singleton and Denning L.JJ., Morris L.J. dissenting).

This was an appeal by the appellant company, Esso Petroleum Co. Ltd., from an order of the Court of Appeal dated June 3, 1954, which set aside a judgment of Devlin J. in its favour and directed that judgment be entered for the respondents, the Southport Corporation, for an amount of damages to be ascertained by the registrar of the Liverpool District Registry, with costs in respect of damage by oil to the foreshore at Southport in the Ribble estuary.

The facts, stated by Earl Jowitt and Lord Morton of Henryton, were as follows: The action was brought by the respondents, the owners of the foreshore, against the appellants, the owners of the *S.S. Inverpool*, and against George McMeakin, her master, in respect of the damage occasioned to the foreshore by the discharge of a quantity of oil from the *Inverpool*. Devlin J., after hearing the evidence, delivered judgment for the then defendants, the present appellants, and Mr. McMeakin.

The Court of Appeal dismissed the appeal so far as Mr. McMeakin was concerned; and that part of the decision of the Court of Appeal was not the subject of an appeal to the House of Lords. The Court of Appeal allowed the appeal, giving judgment against the present appellants.

The *Inverpool* was a small tanker of 680 tons gross. Her master and chief engineer were experienced seamen, and she carried a crew of 11 hands all told. On December 3, 1950, she left Liverpool at 7.30 a.m. on a voyage to Preston. She arrived at the Nelson Buoy at the entrance to the Ribble estuary at 11.40 a.m. and waited there for the tide, high water at Preston being at 5.17 p.m. She left the Nelson Buoy at 2.30 p.m. and made for the buoyed channel. The wind was N.N.W. force 7 or 8, and the sea was moderately rough. Shortly after leaving the Nelson Buoy she shipped some very heavy seas; and for some unexplained reason her steering thereafter became erratic and she began sheering four or five points to starboard and to port. The master decided, notwithstanding his knowledge of the defective steering, to continue on his course towards Preston, although this involved the navigation of a comparatively narrow and shallow channel.

On the south side of the channel there was a revetment wall about seven or eight feet wide and about three to six feet above datum. When the *Inverpool* had passed Salter's Buoy she took a heavy sheer to starboard and ran aground on the revetment wall. She was lying in a dangerous position, and was in danger of breaking her back. The safety of the ship was at stake and the lives of her crew were in peril. The engines were put full astern, but it was found that the propeller was fouling some hard object, and the chief engineer feared that the main steam pipe might fracture. This was reported to the master, who ordered the engineer to stop the engines.

In those circumstances the master decided to discharge considerable quantities of the cargo of oil to lighten the ship. The oil so discharged was carried by the action of the wind and tide on to the premises of the Southport Corporation, the respondents to this appeal. They were put to considerable expense in cleaning their premises from the oily discharge and brought their action against the appellants, the owners of the *Inverpool*, and against her master to recover such expenses.

By paragraph 1 of their statement of claim the respondents alleged that they were the owners and occupiers of the foreshore and the marine lake situate on part thereof in Southport; that the appellants were at all material times the owners and had the management and control of the oil tanker *Inverpool*, and that the second-named defendant (McMeakin) was at all material times the master of the said tanker and the servant or agent of the appellants.

Paragraph 2 was as follows: "In the afternoon of December "3, 1950, the said oil tanker was proceeding under the manage-"ment, control and command of the second-named defendant "into the channel or estuary of the River Ribble with a cargo "of about 850 tons of oil, when owing to the negligent navigation, "management and control of the said oil tanker, by the said "defendant, the said oil tanker struck the revetment wall on the "southerly side of the said channel and grounded on a sandbank "behind the said wall, and after striking the said revetment wall "the said defendant caused approximately 400 tons of the said "cargo of oil to be discharged overboard from the said oil tanker "into the waters of the said channel or estuary. The oil so "discharged became deposited on the said foreshore and in the "said marine lake and thereby caused damage to and created a "trespass and/or nuisance upon the said foreshore and marine "lake, and the plaintiffs thereby sustained damage.

"Particulars.

"The second-named defendant was negligent in the naviga-"tion, management and control of the said oil tanker in that:—
" . . ."

There followed particulars of alleged negligence of the master, and paragraph 3 of the statement of claim continued as follows: "By reason of the said negligence in the navigation, management "and control of the said oil tanker and the acts and defaults "hereinbefore mentioned and the wrongful discharge of the said "oil from the said tanker into the waters of the channels or "estuary of the said River Ribble, the said oil lodged and settled "on the said foreshore and in the said marine lake, and the plain-"tiffs have incurred much expense in the removal and clearing and "endeavour to remove and clear the said foreshore and marine "lake of the said oil and the reinstatement of the plaintiffs' said "property to its former condition, and have suffered loss and "damage."

Particulars of the sum so expended by the respondents were then set out, and the claims were for "(1) damages in respect of "such expense, loss and damage by reason of the matters aforesaid; (2) such further and other relief as in the circumstances "the court may see fit to award."

The appellants by their defence denied the alleged negligence, trespass, nuisance and damage, and then set out fully their account of the events leading up to the discharge of oil from the tanker—an account which was in substance accepted by Devlin J. The defence ended with the following allegation: "In the "premises it was necessary to discharge oil from the *Inverpool* "in order to protect the vessel and the lives of those on board "her and such discharge was carried out without negligence on "the part of those on board the *Inverpool*."

On May 26, 1953, the appellants asked for further and better particulars of the statement of claim. These were supplied on June 13, 1953. By that date the respondents had seen the master's report. They knew that the steering of the *Inverpool* had become very erratic and they knew also that when the vessel was examined, after the events of December 3, 1950, it was found that there was a fracture of the stern frame and serious damage to the rudder; the propeller had one blade broken off and three blades broken at the top. These facts were set out in the particulars delivered on June 13, 1953, and the following sub-paragraph was added by amendment to paragraph 2 of the statement of claim: "a. The said oil tanker was caused to be "navigated into and enter the said channel when the steering "of the said oil tanker was erratic and steering badly and when "the helm could not be got over and was slow to move and when "having regard to these conditions it was dangerous to enter the "said channel."

Devlin J. gave a reserved judgment, on October 28, 1953, as follows: In this case questions of seamanship and navigation arise and, acting under the Judicature Act, 1925, s. 98, and R.S.C., Ord. 36, r. 43, I have appointed one of the Elder Brethren of Trinity House to act as an assessor and to advise me upon them. In *Waddle* v. *Wallsend Shipping Co. Ltd.*[1] I called attention to what seemed to me to be the undesirability of having questions of this sort tried by a judge of the Queen's Bench Division sitting without assistance. The practice of sitting with the Elder Brethren is always followed in the Admiralty Division, and if it is not followed in this Division as well it is bound to lead to the belief that the result will not be as satisfactory as it should be. I have therefore been advised by an Elder Brother, Commodore Hubbard, R.D., R.N.R., before arriving at my conclusions in this case, but I have not had his assistance during the hearing. I hesitated in this case, as I did in *Waddle* v. *Wallsend Shipping Co. Ltd.*,[1] to adjourn the trial so that an assessor might be present because of the inconvenience to the parties and their solicitors and counsel. But I doubt whether I shall in any similar case in the future allow these considerations to deter me again.

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[1] [1952] 2 Lloyd's Rep. 105, 131.

The case concerns a small tanker called the *Inverpool*, belonging to the defendant company, which stranded in the Ribble estuary on December 3, 1950; and the master, in order to refloat her, discharged about 400 tons of fuel oil. The oil became deposited on the foreshore, which belongs to the plaintiffs, the Southport Corporation, and entered the marine lake, a feature of the foreshore. [His Lordship referred to the extent of the deposit and continued:] It became necessary to close the marine lake for a time and also parts of the foreshore, and it has cost, or will cost, the corporation a substantial sum to make good the damage.

The deposit of oil around the coast is, it is admitted, causing considerable anxiety, and it is satisfactory to know that the authorities are not being inactive. At first sight, it may appear to be unreasonable that shipowners whose servants cause such damage in order to save their own property should not automatically have to pay for it. But Mr. Nelson, for the defendants, submits that at common law there is no duty at all upon ships to avoid this type of damage. If Parliament considers that further legislation is necessary for the protection of the public, no doubt such legislation will be enacted. My duty is to apply the common law, and to examine therefore the causes of action upon which the plaintiffs rely. These are trespass, nuisance and negligence. The trespass, alternatively the nuisance, is said to arise from the bare fact that oil was discharged on to the plaintiffs' property. The negligence is put under two heads: first, that there was negligent navigation resulting in the stranding, and secondly, that it was unreasonable and unnecessary after the stranding to jettison cargo. The charge of negligent navigation rests, in the first instance, upon the fact of stranding, which obviously calls for an explanation. The master's explanation is that it was due to a defect in the steering. The plaintiffs contend that if this is true the defendants must show that the defect in steering was not their fault; and further, they say that of a third party who has no stake in the venture which is being saved.

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[1] [1952] 2 Lloyd's Rep. 105, 131.

The defence of necessity would therefore have called for close examination if in fact it had been based solely on the saving of property and if in law I had thought that the plaintiffs' rights of ownership in the foreshore were unqualified by their proximity to the sea. But apart from the law, on which I have already expressed my view, the facts of this case, when examined, show that the peril said to justify the discharge of the cargo is that the ship was in imminent danger of breaking her back. The consequence of that would be not merely that the ship herself would become a total loss, but that in the circumstances of this case the lives of the crew would have been endangered. The safety of human lives belongs to a different scale of values from the safety of property. The two are beyond comparison and the necessity for saving life has at all times been considered a proper ground for inflicting such damage as may be necessary upon another's property. I think, therefore, that if I am wrong in the application of the principle which I have taken from Lord Blackburn, the defence in this case can equally well be put on the ground of necessity.

It is, of course, an answer to either of these defences if the predicament in which the ship found herself was due to her own negligence. Indeed, in the principle I am applying it is necessary, as Lord Blackburn said, for the plaintiffs to prove negligence, and so my examination of the law results in the conclusion that this action is to be treated in the same way as any running-down or collision case in which the plaintiff alleges negligence. I do not accept Mr. Nelson's submission that if the master was careless, nevertheless he could not have anticipated this form of injury to the plaintiffs' property. The damage and nuisance that is caused to the coast by oil on the water is well known. If done deliberately, it is punishable by statute, and I think that that is a matter which should be well in the mind of the master of every coastal tanker. He must be aware that if in an estuary he gets himself into a position where he has to jettison oil, it is very likely to reach some part of the coast. In this case the master accepted the likelihood of the oil reaching the Southport foreshore.

In saying that this case has to be treated as an ordinary case where negligence is alleged, I must make one qualification. The plaintiffs allege on the authority of *The Merchant Prince* [16] that the circumstances in which the stranding occurred shift the burden of proof and require the defendants to prove inevitable accident. It will be more convenient to deal with this after the facts have been ascertained. [His Lordship stated the facts and continued:] I turn back now to consider the matters in dispute. The charges that the master ought not to have entered the channel or to have jettisoned after stranding cause me little difficulty, and I can deal with them both broadly by saying that I see no reason to criticize the decisions of the man on the spot and certainly none to condemn them as evidencing his incompetence. The plaintiffs contend that the master, knowing before he entered the channel that there was something wrong with his steering, ought to have anchored or turned about and hove to or put back to sea. The master answered that in the weather at the time, to anchor was impossible and to turn about more dangerous than to proceed. He recognized the danger of proceeding into a narrow channel with defective steering gear; he weighed up the two evils, he said, and considered that the lesser of the two was to attempt to get into sheltered water. I should not without assistance be able to say whether the master made the right choice or not, but I should feel able to say that his choice was not a careless or unskilful one, which would be enough to dispose of the charge of negligence. In fact, the Elder Brother advises me that in his opinion the master's decision was the right one, and I accept that advice. As to the jettisoning, I consider, and the Elder Brother agrees with this, that the master's decision to lighten his vessel cannot fairly be criticized.

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[16] [1892] P. 179; 8 T.L.R. 430.

The remaining point is much more difficult, because it has not proved possible to arrive at any clear conclusion as to what caused the defect in steering. It remains, the master said, a puzzle and a mystery to him. The plaintiffs say, therefore, that the defendants have failed to prove that they were not responsible for the loss. I approach the problem by considering first what relevant damage was found on the ship at her survey. [His Lordship reviewed the evidence concerning the damage to the tanker, and continued:] I find that the fractured stern frame was the cause of the vessel getting out of control; but on the evidence I am unable to say how it was fractured.

In this state of the evidence Mr. Carpmael submits that the defendants must prove inevitable accident. To do this they must prove the cause or causes of the accident, and, if they cannot do that, they fail. He relies on *The Merchant Prince.*[16] In that case the defendant ship when under way ran into the plaintiff the highway cannot complain of damage done by persons using the highway unless it is done negligently: *Goodwyn* (*Goodwin*) v. *Cheveley*,[8] *Tillett* v. *Ward*[9] and *Gayler & Pope Ltd.* v. *B. Davies & Son Ltd.*[10] These cases amplify the principle in *Holmes* v. *Mather*,[11] which dealt with collisions on the highway itself and which is the foundation of the modern practice whereby a plaintiff in a running-down action sues for negligence and not for trespass to the person. I know of no case in which the same principle has in terms been applied to collisions in public navigable waters; but clearly it is so applied, for a plaintiff would not get very far in an Admiralty action if he sued for trespass to a chattel. This suggests that the amplification of the principle ought likewise to be applied in the case of property adjacent to public navigable waters. Again, I know of no case which on its facts decides that in terms, though there are dicta in *The Swift*[12]—a rather different type of case—on which Mr. Nelson properly relied.

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[16] [1892] P. 179.

But there is hardly need to search for exact authority, for the point is covered by two dicta, which may be obiter but which bear the great authority of Lord Blackburn and which lay down the same rule on land and water. In *Fletcher* v. *Rylands*[13] Blackburn J. said: "Traffic on the highways, whether by land "or sea, cannot be conducted without exposing those whose "persons or property are near it to some inevitable risk; and "that being so, those who go on the highway, or have their "property adjacent to it, may well be held to do so subject to "their taking upon themselves the risk of injury from that "inevitable danger." The judge then went on to say that such persons could not recover "without proof of want of care or skill "occasioning the accident." In *River Wear Commissioners* v. *Adamson*[14] Lord Blackburn said: "My Lords, the common law "is, I think, as follows:—property adjoining to a spot on which "the public have a right to carry on traffic is liable to be injured "by that traffic. In this respect there is no difference between "a shop, the railings or windows of which may be broken by a "carriage on the road, and a pier adjoining to a harbour or a "navigable river or the sea, which is liable to be injured by "a ship. In either case the owner of the injured property must "bear his own loss, unless he can establish that some other "person is in fault, and liable to make it good."

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[8] (1859) 28 L.J.Ex. 298.

[9] (1882) 10 Q.B.D. 17.

[10] [1924] 2 K.B. 75; 40 T.L.R. 591.

[11] (1875) L.R. 10 Ex. 261.

[12] [1901] P. 168, 173; 17 T.L.R. 400.

[13] (1866) L.R. 1 Ex. 265, 286.

[14] (1877) 2 App.Cas. 743, 767.

Lord Blackburn refers to injury by a ship. The principle is not, in my judgment, restricted to direct injury, as when a ship strikes a pier, but is equally applicable to injury which is done indirectly by a ship in the ordinary course of navigation. It covers injury done as the result of the discharge of oil, if the discharge is a prudent measure of safety taken by the master of the ship because of the vessel finding herself in distress without her fault. The Oil in Navigable Waters Act, 1922, is not directly in point because it applies only to criminal offences, but it is interesting to observe the test there laid down. Prima facie, it is an offence under the Act to discharge oil in territorial waters; but it is a good defence if it was necessary to discharge the oil by reason of the happening to the vessel of some accident. I think that the same test is under the common law applicable in the case of civil proceedings; and that owners whose property adjoins the sea, equally with owners whose property adjoins the highway, take the risk of damage being done by users of the sea or of the highway who are exercising with due care their rights of navigation or of passage. To the word "adjoin" I give the interpretation I have already considered, i.e., the test is proximity and not contiguity.

Upon this view of the law it is unnecessary for me to consider in detail the alternative defence of necessity, which is in some respects only a variant of the defence which I have already considered. One of the earliest cases of necessity, *Mouse's Case*,[15] was a case of jettison. But the defence of necessity applies irrespective of the situation of the property damaged and so of the principle I have just considered; on the other hand, I am not satisfied that it applies (as it does under the principle I have just considered) if the only object whose salvation is at stake is a ship. I am not prepared to hold without further consideration that a man is entitled to damage the property of another without compensating him merely because the infliction of such damage is necessary in order to save his own property. I doubt whether the court in such circumstances can be asked to evaluate the relation of the damage done to the property saved, by inquiring. for example, whether it is permissible to do £5,000 worth of damage to a third party in order to save property worth £10,000. In the ordinary case of jettison the property which is sacrificed is the property of a person who is interested in the venture, and an equitable adjustment is made by the application of general average. The same considerations may not apply to the property of a third party who has no stake in the venture which is being saved.

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[15] (1608) 12 Co.Rep. 63.

The defence of necessity would therefore have called for close examination if in fact it had been based solely on the saving of property and if in law I had thought that the plaintiffs' rights of ownership in the foreshore were unqualified by their proximity to the sea. But apart from the law, on which I have already expressed my view, the facts of this case, when examined, show that the peril said to justify the discharge of the cargo is that the ship was in imminent danger of breaking her back. The consequence of that would be not merely that the ship herself would become a total loss, but that in the circumstances of this case the lives of the crew would have been endangered. The safety of human lives belongs to a different scale of values from the safety of property. The two are beyond comparison and the necessity for saving life has at all times been considered a proper ground for inflicting such damage as may be necessary upon another's property. I think, therefore, that if I am wrong in the application of the principle which I have taken from Lord Blackburn, the defence in this case can equally well be put on the ground of necessity.

It is, of course, an answer to either of these defences if the predicament in which the ship found herself was due to her own negligence. Indeed, in the principle I am applying it is necessary, as Lord Blackburn said, for the plaintiffs to prove negligence, and so my examination of the law results in the conclusion that this action is to be treated in the same way as any running-down or collision case in which the plaintiff alleges negligence. I do not accept Mr. Nelson's submission that if the master was careless, nevertheless he could not have anticipated this form of injury to the plaintiffs' property. The damage and nuisance that is caused to the coast by oil on the water is well known. If done deliberately, it is punishable by statute, and I think that that is a matter which should be well in the mind of the master of every coastal tanker. He must be aware that if in an estuary he gets himself into a position where he has to jettison oil, it is very likely to reach some part of the coast. In this case the master accepted the likelihood of the oil reaching the Southport foreshore.

In saying that this case has to be treated as an ordinary case where negligence is alleged, I must make one qualification. The plaintiffs allege on the authority of *The Merchant Prince*[16] that the circumstances in which the stranding occurred shift the burden of proof and require the defendants to prove inevitable accident. It will be more convenient to deal with this after the facts have been ascertained. [His Lordship stated the facts and continued:] I turn back now to consider the matters in dispute. The charges that the master ought not to have entered the channel or to have jettisoned after stranding cause me little difficulty, and I can deal with them both broadly by saying that I see no reason to criticize the decisions of the man on the spot and certainly none to condemn them as evidencing his incompetence. The plaintiffs contend that the master, knowing before he entered the channel that there was something wrong with his steering, ought to have anchored or turned about and hove to or put back to sea. The master answered that in the weather at the time, to anchor was impossible and to turn about more dangerous than to proceed. He recognized the danger of proceeding into a narrow channel with defective steering gear; he weighed up the two evils, he said, and considered that the lesser of the two was to attempt to get into sheltered water. I should not without assistance be able to say whether the master made the right choice or not, but I should feel able to say that his choice was not a careless or unskilful one, which would be enough to dispose of the charge of negligence. In fact, the Elder Brother advises me that in his opinion the master's decision was the right one, and I accept that advice. As to the jettisoning, I consider, and the Elder Brother agrees with this, that the master's decision to lighten his vessel cannot fairly be criticized.

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[16] [1892] P. 179; 8 T.L.R. 430.

The remaining point is much more difficult, because it has not proved possible to arrive at any clear conclusion as to what caused the defect in steering. It remains, the master said, a puzzle and a mystery to him. The plaintiffs say, therefore, that the defendants have failed to prove that they were not responsible for the loss. I approach the problem by considering first what relevant damage was found on the ship at her survey. [His Lordship reviewed the evidence concerning the damage to the tanker, and continued:] I find that the fractured stern frame was the cause of the vessel getting out of control; but on the evidence I am unable to say how it was fractured.

In this state of the evidence Mr. Carpmael submits that the defendants must prove inevitable accident. To do this they must prove the cause or causes of the accident, and, if they cannot do that, they fail. He relies on *The Merchant Prince.*[16] In that case the defendant ship when under way ran into the plaintiff ship at anchor. Fry L.J. said[17]: "The burden rests on the "defendants to show inevitable accident. To sustain that the "defendants must do one or other of two things. They must "either show what was the cause of the accident, and show "that the result of that cause was inevitable; or they must "show all the possible causes, one or other of which produced "the effect, and must further show with regard to every one "of these possible causes that the result could not have been "avoided." If there is a burden upon the defendants in the present case to prove inevitable accident they have not, in my opinion, discharged it. They have not shown the ultimate cause or causes; indeed, they have not set about the proof at all. I accept that on the voyage in question the vessel showed no sign of any defect in her steering until 14.45, and I am satisfied that until then the master knew nothing of it. But I cannot exclude the possibility that there was some defect in her stern frame which made it liable to fracture. I think that the proof of inevitable accident in such a case as this requires that the defendants should offer some detailed evidence of the steps they took, by way of surveys and so forth, to make sure that there were no discoverable defects in her structure; in short, they should prove that they had exercised due diligence to make and keep her seaworthy. This they have not done.

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[16] [1892] P. 179.

I do not find *The Merchant Prince*[18] an easy case to apply. One must distingush, I think, between a case where inevitable accident has to be proved as a matter of defence and a case of res ipsa loquitur. Take, for example, trespass to which inevitable accident may be a defence. When the plaintiff proves the trespass (I am dealing now with the ordinary case and not with trespass arising from use of the highway) his cause of action is complete, and the defendant fails unless he proves his defence. But when the cause of action is negligence, the plaintiff must prove negligence; res ipsa loquitur is a principle which helps him to do so. In the classic statement of the rule by Erle C.J. in *Scott* v. *London and St. Katherine Docks Co.*[19] one finds that it says no more than that the happening of an accident may in certain circumstances itself be reasonable evidence of negligence; and when there is reasonable evidence of negligence put forward by the plaintiff and no explanation put forward by the defendant, the plaintiff is of course entitled to succeed. If the defendant offers a plausible explanation consistent with his diligence, the plaintiff is back where he was before and must show the greater probability of negligence. The distinction is seen at once in pleading. In trespass the defendant must plead inevitable accident: *Hall* v. *Fearnley*.[20] In negligence he need only plead a denial: *Rumbold* v. *London County Council*.[21]

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[17] [1892] P. 189.

[18] [1892] P. 179; 8 T.L.R. 430.

[19] (1865) 3 H. & C. 596, 601.

The cases in which the res ipsa loquitur rule is elaborated were cited and applied by Langton J. in *The Kite*,[22] and more of them will be found in the judgment of Atkinson J. in *Imperial Smelting Corporation Ltd.* v. *Joseph Constantine Steamship Line Ltd.*[23] The rule as there stated does not require from the defendant the sort of proof demanded by Fry L.J. *The Merchant Prince* [24] was not a case of trespass or anything of that sort, but one in which the plaintiff alleged negligence and sought to prove it by offering the circumstances of the collision as prima facie evidence. The case embodies a rule of long standing in Admiralty matters involving a collision with a ship at anchor. It may be that it is properly to be regarded as a rule of limited application. If I had to rely upon my own judgment, I should not be able to appreciate the distinction which has been drawn between *The Merchant Prince* [24] and *The Kite* [25] in later cases such as *The Dageid*.[26]

But I need not pursue these difficulties, because in relation to a decision of the Court of Appeal they are impertinent, and because I think that I can without directly meeting them give to the decision in *The Merchant Prince* [27] all the effect which I am bound to give to it. That decision does not enable the plaintiffs to succeed otherwise than upon a charge of negligence which they have pleaded. The only negligence alleged in this case is against the master, who is the second defendant, in respect of his navigation and management of the *Inverpool* in relation to this voyage; the owners of the ship, the first defendants, are sued only as answerable for the master's wrongdoing. I am satisfied that the master was not personally negligent, and that he had not before 14.45 any reason to apprehend that there was any defect in his ship. If the rule in *The Merchant Prince* [27] requires him personally to prove what the cause of the defect in the steering was, and I doubt that it does, then it cannot stand against the decision of the House of Lords in

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[20] (1842) 3 Q.B. 919.

[21] (1909) 25 T.L.R. 541.

[22] [1933] P. 154; 49 T.L.R. 525.

[23] [1940] 1 K.B. 812, 827; 56 T.L.R. 461.

[24] [1892] P. 179.

[25] [1933] P. 154.

[26] (1947) 80 Ll.L.Rep. 517, 522.

[27] [1892] P. 179.

Woods v. *Duncan*,[28] which lays it down that if a defendant can satisfy the court that he personally was not negligent, he does not have to explain how the accident occurred.

There can be no doubt that, apart from any principle that may be derived from *The Merchant Prince*,[29] the rule laid down by Lord Blackburn, which I am applying, requires the plaintiffs to prove negligence and not the defendants to prove inevitable accident. For the reasons which I have given the plaintiffs have failed to prove negligence and accordingly there must be judgment for the defendants.

The Court of Appeal held, by a majority, that the doctrine of res ipsa loquitur applied and that the onus was on the appellants to explain why the steering gear went wrong; as they had not done so, they were liable in negligence. They affirmed the judgment of Devlin J. in favour of the master.

H. I. Nelson Q.C. and *G. B. H. Currie* for the appellant company. This case turned on a charge of negligence against the master only imposing a vicarious liability on the shipowners. In an action based on negligence a defendant is only bound to rebut the negligence alleged. Here, since no case of trespass or nuisance was made out, it is a plain case of negligence. The Court of Appeal affirmed the judge's finding that the master was not negligent and accordingly they should have dismissed the appeal instead of deciding against the shipowners on an issue which was not raised in the pleadings.

The master has been acquitted of creating a public nuisance, which is an indictable misdemeanor. Such a charge could not be supported against the shipowners on the ground that they sent the ship to sea with defective steering gear as a result of which someone discharged oil into the sea. Further, on the question of interfering with the user of a public highway, a navigable channel is a public highway but the sea is not normally a highway. The shipowners are not responsible for a private nuisance in any ordinary sense. As to trespass, it did not lie at all on the evidence.

The onus of showing negligence lies on the party alleging it, although where the doctrine res ipsa loquitur applies the burden may temporarily shift to the defendant, but, even then, when

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[28] [1946] A.C. 401; 62 T.L.R. 283; [1946] 1 All E.R. 420n.

[29] [1892] P. 179.

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the defendant has given an explanation and all the evidence has been heard, the ultimate test is: Has negligence been proved against him? This applies to all cases: see *Woods* v. *Duncan* [1]; *The Dageid* [2]; *Imperial Smelting Corporation Ltd.* v. *Joseph Constantine Steamship Line Ltd.*[3]; *Joseph Constantine Steamship Line Ltd.* v. *Imperial Smelting Corporation Ltd.*[4] If the effect of *The Merchant Prince* [5] is as the respondents contend it was wrongly decided. There is a difference between the authorities in relation to negligence on land and negligence at sea because at sea there are external elements to contend with.

K. S. Carpmael Q.C. and *A. E. Baucher* for the respondent corporation. The allegation of nuisance at the end of paragraph 2 of the statement of claim is not to be read as alleging that the nuisance resulted from the negligence previously pleaded, viz., the negligence of the master. The exoneration of the master did not therefore import the exoneration of the shipowners. All the foreshore owners knew about was the oil damage. They did not know of the steering damage, which was solely within the knowledge of the shipowners, and accordingly they could not plead it. There was nothing about the damaged stern frame in the defence.

It was for the defendant shipowners to show that the faulty steering was not due to any negligence on their part. Vessels if properly navigated do not go aground on a revetment wall in weather such as this. The shipowners alone knew anything of the upkeep of the ship and they chose to say nothing about the stern frame until it was mentioned in evidence. After that the foreshore owners were allowed by the judge to argue their case so as to raise the argument based on *The Merchant Prince*.[6] It was for the shipowners to prove how the occurrence happened and to show that it was due to inevitable accident. They did not discharge this onus. The stern frame may have been in an unsound condition at the start of the voyage so that it was damaged by seas which would not have damaged a sound stern frame. The foreshore owners having made out a prima facie case of negligence against the shipowners in regard to a ship within their sole control, the onus then fell on the shipowners.

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[1] [1946] A.C. 401, 409; 62 T.L.R. 283; [1946] 1 All E.R. 420n.

[2] (1947) 80 Ll.L.Rep. 517.

[3] [1940] 1 K.B. 812; 56 T.L.R. 461; [1940] 2 All E.R. 46; (C.A.) [1940] 2 K.B. 430; 56 T.L.R. 882; [1940] 3 All E.R. 211.

[4] [1942] A.C. 154; 57 T.L.R. 485; [1941] 2 All E.R. 165.

[5] [1892] P. 179; 8 T.L.R. 430.

[6] [1892] P. 179, 189.

This is not a case like *Bolton* v. *Stone*[7] since here all the relevant facts were not known. Reliance is placed on *Carmarthenshire County Council* v. *Lewis*.[8] *Barkway* v. *South Wales Transport Co. Ltd.*[9] applies the same principle.

As to trespass, see *per* Devlin J.[10] *Jones* v. *Llanrwst Urban District Council*[11] applies. There is no real difference between the case of faecal matter in that action and oil in the present action. See also *per* Singleton and Denning L.JJ. in the present case.[12] *Smith* v. *Great Western Railway Co.*[13] illustrates the position when one sues in nuisance. The present case is analogous to that of a driver who drives his car against a shop front. It is a trespass and it is for him to establish a justification for his action.

In summary, although the statement of claim and particulars are not in ideal form, the matter comes down in the end to a pleading point. If Devlin J. had not acquiesced in the respondents' case being put as it was they would have had to apply for leave to amend and, if necessary, for an adjournment, but he went on with the case and every point was argued, as appears from his judgment. In effect it is as if he had given leave to amend to bring the case within the terms of the writ. It was wrong for him to say at the end of his judgment that the case put forward by the respondents was not pleaded. When the case started they did not know that the appellants were going to say that the broken stern frame caused the trouble. The decision of this matter should not turn on a point of pleading and the remarks of Singleton L.J.[14] were amply justified. The onus is on the appellants to show how the accident happened and it should remain on them. They did not attempt to discharge it.

H. I. Nelson Q.C. in reply. The case for the appellants always was that owing to the heavy weather the ship suddenly became unmanageable. This was their case throughout. The respondents were aware of the fracture to the stern frame by June 13, 1953. As to the onus of proof, see *Imperial Smelting Corporation Ltd.* v. *Joseph Constantine Steamship Line Ltd.*[15] Whether or not the doctrine of res ipsa loquitur applied at any stage of the proceedings, the appellants have given an explanation and it was found by the judge that they were guilty of no negligence.

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[7] [1951] A.C. 850, 859–860; [1951] 1 T.L.R. 977; [1951] 1 All E.R. 1078.

[8] [1955] A.C. 549; [1955] 2 W.L.R. 517; [1955] 1 All E.R. 565.

[9] (1950) 66 T.L.R. (Pt. 1) 597, 599; [1950] 1 All E.R. 392, 394.

[10] Ante, p. 225.

[11] [1911] 1 Ch. 393, 402–403; 27 T.L.R. 133.

[12] [1954] 2 Q.B. 182, 194, 196, 197; [1954] 2 All E.R. 561.

[13] (1926) 135 L.T. 112, 113; 42 T.L.R. 391.

[14] [1954] 2 Q.B. 182, 192.

[15] [1940] 1 K.B. 812, 827.

Their Lordships took time for consideration.

Dec. 12. EARL JOWITT [having stated the facts]: My Lords, it is obvious that a well-found ship, if properly navigated, would, in the absence of abnormal circumstances, not have run aground on the wall and would not have got herself into such difficulties that it became necessary to discharge a considerable part of the oil which constituted her cargo.

What, then, were the circumstances which made this course necessary? [His Lordship stated the circumstances of the grounding as set out by Devlin J. and continued:] The action which the respondents brought against the appellants, the owners of the *Inverpool*, and against Mr. McMeakin (her master) was based upon trespass, nuisance and negligence.

Devlin J. decided that the fact that it was necessary to discharge the oil in the interest of the safety of the crew afforded a sufficient answer to the claim based upon trespass or nuisance. I agree with him in this view and think it unnecessary to consider whether, had this fact not been established, the cause of action in trespass or nuisance would have succeeded.

There remains the question of negligence. The statement of claim alleged that there had been negligence in the navigation of the *Inverpool* whereby she grounded on the revetment wall, and that her master had taken no sufficient steps to prevent such grounding. It further alleged that the discharge of the oil was unnecessary and unreasonable, and that the master ought under the circumstances to have obtained the assistance of a pilot or of tugs. All these allegations were disposed of adversely to the plaintiffs, the present respondents, by the findings of the trial judge.

There remained, however, one further allegation which was added to the statement of claim by amendment: namely, that it was negligent to cause the *Inverpool* to enter and navigate the channel when it was known that her steering was erratic. Devlin J. disposed of this suggestion as follows [1]: "The plaintiffs "contend that the master, knowing before he entered the channel "that there was something wrong with his steering, ought to "have anchored or turned about and hove to or put back to sea.

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[1] Ante, p. 229.

"The master answered that in the weather at the time, to "anchor was impossible and to turn about more dangerous than "to proceed. He recognized the danger of proceeding into a "narrow channel with defective steering gear; he weighed up "the two evils, he said, and considered that the lesser of the "two was to attempt to get into sheltered water. I should not "without assistance be able to say whether he made the right "choice or not, but I should feel able to say that his choice was "not a careless or unskilful one, which would be enough to "dispose of the charge of negligence. In fact, the Elder Brother "advises me that, in his opinion, the master's decision was the "right one, and I accept that advice."

It follows, therefore, that every allegation in the statement of claim, and the particulars thereunder, was decided by the judge in a sense adverse to the respondents.

Mr. Carpmael relied upon the doctrine of *The Merchant Prince*,[2] and claimed that it was for the appellants to prove how the accident happened. He rightly asserted that they had not explained how it came about that the stern frame had fractured. The facts in the case of *The Merchant Prince* [3] were that, under weather conditions by no means exceptional and in broad daylight, a ship under way had collided with a ship at anchor. The court decided that under these circumstances the onus lay on the colliding ship to negative the charge of negligent navigation which had been made against it. The defendant in such a case, to discharge the onus thus cast upon him, must show that the accident was inevitable. In that particular case the steering wheel had become jammed, and in consequence of this jamming the collision took place. The question for determination was whether it had become jammed through some negligence on the part of the defendants' servants. Butt P. came to the conclusion that the owners of the *Merchant Prince* had shown that there had been no negligence, and as in this view the accident was inevitable he decided in favour of the defendants. This decision was reversed in the Court of Appeal. That court pointed out that the steering gear was connected with the rudder by a stud-link chain; and that if the chain was allowed to become too tight it would not work, and if it was allowed to become too loose it was liable to kink. The court decided that the probable cause of the jamming was that the chain had been allowed to become too loose with the result that two of the links kinked as they went round the leading wheel. The chain was a new one, and in a new chain links are liable to stretch. This, in the view of the Court of Appeal, was a danger which ought to have been foreseen and could have been guarded against. It followed, in the opinion of the Court of Appeal, that the defendants had failed to show that the accident was inevitable, and accordingly, as the defendants had not discharged the onus which was upon them, judgment was entered for the plaintiffs.

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[2] [1892] P. 179, 189; 8 T.L.R. 430.

[3] [1892] P. 179.

My Lords, I do not think that the respondents in this case can derive any assistance from the decision in *The Merchant Prince*.[3] No one has ever suggested that the fracture of the stern frame, which caused the steering of the *Inverpool* to become defective, was in any way caused or contributed to by the negligence of those in charge of the navigation of the ship. There was, and there could be, nothing analogous to the improper adjustment of the chain; nor was there any allegation of unseaworthiness made in the statement of claim: throughout the course of the case no question was directed to the master or chief engineer in any way bearing on the question of unseaworthiness; and the case made against the present appellants at the trial rested entirely on their responsibility for the acts of the master as their servant.

If the plaintiffs' case had been put in the alternative, either that there was some navigational error or that the ship was unseaworthy, the case would no doubt have been developed on wholly different lines. Had any such case been made, the ambit of discovery would have been enlarged and the theory advanced by the Elder Brother that the *Inverpool* may have broken her stern frame against the bed of the channel would have been explored. It is idle to speculate what would have happened if such a case had been made.

In the present case every allegation of negligence has been answered by the finding of the judge, and there was no allegation of unseaworthiness. That being so, I do not think that the present appellants, the owners of the *Inverpool*, can be held responsible because they did not negative some possible case which had never been alleged against them in the pleadings or made against them in the course of the trial.

For the reasons I have given I am in favour of allowing the appeal and restoring the judgment of Devlin J.

I merely desire to add that I am in entire agreement with the observations of Devlin J. in regard to the assistance of the

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[3] [1892] P. 179.

Elder Brother. In the present case he did not have that assistance during the hearing, but obtained it after the trial was concluded. He indicated that in similar cases in the future he would take steps to secure the presence of an Elder Brother to act as assessor during the trial.

I should like to express my concurrence with this expression of intention. If a judge comes to the conclusion that the case is one in which he would profit by the presence of an assessor, it is manifestly more satisfactory that this assistance should be available during the trial rather than after its completion.

Lord Normand. My Lords, it is unnecessary for me to add anything on trespass and nuisance. I agree with my noble and learned friends, whose opinions I have had the advantage of reading, that the real issue in the appeal is that of negligence.

On negligence the appellants' first and main contention was that the Court of Appeal have travelled beyond the negligence alleged by the respondents. The respondents' pleadings show (1) that the owners and master of the ship were charged with the same negligent acts or omissions, for which the owners would be liable vicariously and the master directly, if they were proved; (2) that all these acts and omissions were errors in the navigation of the ship; (3) that they began when, and not before, the ship was about to enter the channel of the river Ribble on her way to Preston; (4) that after the respondents had seen the master's report, which disclosed that the stern frame had been fractured, the rudder damaged, and the propeller blades broken, they amended their pleadings by adding an allegation of negligence in navigating the vessel into the channel when the steering was erratic. These were the allegations which the respondents set out to prove. There was no notice in the pleadings of any other cause of action, such as that the appellants negligently sent the vessel to sea in an unseaworthy condition.

The function of pleadings is to give fair notice of the case which has to be met so that the opposing party may direct his evidence to the issue disclosed by them. In fact the evidence in the case was concerned only with the negligence alleged. The result was that the master of the vessel was acquitted by Devlin J. of the negligence alleged, and the logical consequence was that the owners were also acquitted by him.

The majority of the Court of Appeal, however, held that the onus lay on the owners to show that the accident which caused the damage was inevitable, and to do this it would have been

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necessary to show that no reasonable care which they might have taken would have avoided the damage. As the appellants had made no attempt to lead evidence to discharge this onus, the majority of the Court of Appeal found them liable in damages.

I do not wish to speculate on what might have been alleged, nor on what evidence might have been adduced by either side on other allegations, nor on how the onus might have shifted in consequence of other allegations and evidence. Confining myself to the actual allegations of negligence and to the evidence in the case, I find the conclusion inevitable that, since the master has been acquitted of the faults alleged against him, the owners must also be acquitted. I wish to associate myself with the observations of my noble and learned friend, Lord Radcliffe, on the value of the pleadings. To condemn a party on a ground of which no fair notice has been given may be as great a denial of justice as to condemn him on a ground on which his evidence has been improperly excluded.

I would allow the appeal.

Lord Morton of Henryton. My Lords, this appeal arises out of an action in which the respondents were plaintiffs and the appellants, as owners of the *Inverpool*, and one George McMeakin as master of that vessel, were defendants. The events leading up to the action have already been stated by my noble and learned friend on the Woolsack.

The first submission of counsel for the appellants was that, having regard to the pleadings and to the fact that the Court of Appeal affirmed the judgment of Devlin J. in favour of the master, that court should also have affirmed the judgment of the learned judge in favour of the appellants, instead of deciding against them on an issue which was not raised by the pleadings. This submission leads me at once to a consideration of the pleadings, in order to see exactly what were the issues raised thereby.

[His Lordship stated the material parts of the pleadings and continued:] My Lords, I have set out the pleadings in detail in order to show that no complaint was made of any act or default on the part of the appellants, either in the original statement of claim or at the time when the respondents had the opportunity of amending it with full knowledge of the facts already mentioned. As against the master, it was alleged that he had been negligent, that his negligence was the cause of the discharge of oil from the tanker, that such discharge had resulted in "a trespass and/or "nuisance" and had caused damage to the respondents. It was sought to make the appellants liable only on the ground of vicarious responsibility for the acts and defaults of the master.

All the attacks upon the master's conduct were fought out before Devlin J. and they all failed. The victory of the master destroyed the only ground upon which the respondents by their statement of claim had sought to cast liability upon the appellants. Counsel for the respondents then sought to make a case of which no hint appeared in the pleadings. They contended that in the circumstances the onus was upon the defendants in the action to prove inevitable accident, and they quoted the observation of Fry L.J. in *The Merchant Prince*[4]: "The burden rests "on the defendants to show inevitable accident. To sustain that "the defendants must do one or other of two things. They must "either show what was the cause of the accident, and show that "the result of that cause was inevitable; or they must show all "the possible causes, one or other of which produced the effect, "and must further show with regard to every one of these "possible causes that the result could not have been avoided." Counsel submitted that the defendants had not discharged this burden; for instance, the stern frame might have been in an unsound condition when the tanker started her voyage, and might have been fractured by heavy seas which would not have fractured a sound stern frame. This argument failed before Devlin J. but succeeded with the majority of the Court of Appeal. Devlin J., after referring to *The Merchant Prince*,[5] said[6]: "That decision "does not enable the plaintiffs to succeed otherwise than upon "a charge of negligence which they have pleaded. The only "negligence alleged in this case is against the master, who is the "second defendant, in respect of his navigation and management "of the *Inverpool* in relation to this voyage; the owners of the "ship, the first defendants, are sued only as answerable for the "master's wrongdoing." Having acquitted the master of negligence, he dismissed the action. From that decision the present respondents appealed and the majority of the Court of Appeal held that the burden lay upon the present appellants to show that they had exercised proper care and that they had failed to discharge that burden. The court therefore directed that judgment be entered against the present appellants for an amount of damages to be ascertained but affirmed the judgment of Devlin J. in favour of the master. My Lords, it may well be that the

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[4] [1892] P. 179, 189.

[5] [1892] P. 179.

[6] Ante, p. 231.

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respondents' case might have been pleaded in such a way as to cast upon the present appellants the burden of proving that they had exercised proper care. In that event, as my noble and learned friend on the Woolsack has said, the case would no doubt have developed on different lines. The respondents, however, as I have already pointed out, had pleaded negligence of the master, and trespass and nuisance and damage resulting from such negligence; as against the appellants, they chose to rely only upon the responsibility of the owners for the master's negligence.

In this state of the pleadings it seems to me to follow that the Court of Appeal, having affirmed the judgment of Devlin J. in favour of the master and having thereby acquitted the master of any negligence, should also have affirmed his judgment in favour of the present appellants.

My Lords, I do not regard the first argument of counsel for the appellants as a merely technical one. I think that the course taken by the majority of the Court of Appeal cast upon the appellants a burden which they should not have been called upon to shoulder and caused substantial hardship to them. In my opinion, counsel's first argument ought to succeed, and I would allow the appeal.

LORD RADCLIFFE. My Lords, I think that this case ought to be decided in accordance with the pleadings. If it is, I am of opinion, as was the trial judge, that the respondents failed to establish any claim to relief that was valid in law. If it is not, we might do better justice to the respondents—I cannot tell, since the evidence is incomplete—but I am certain that we should do worse justice to the appellants, since in my view they were entitled to conduct the case and confine their evidence in reliance upon the further and better particulars of paragraph 2 of the statement of claim which had been delivered by the respondents. It seems to me that it is the purpose of such particulars that they should help to define the issues and to indicate to the party who asks for them how much of the range of his possible evidence will be relevant and how much irrelevant to those issues. Proper use of them shortens the hearing and reduces costs. But if an appellate court is to treat reliance upon them as pedantry or mere formalism, I do not see what part they have to play in our trial system.

In my view, the trial turned upon the issue of negligence. It is true that the fact that the oil spread itself over the respondents'

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foreshore was the subject of alternative claims in nuisance and in trespass. So far as nuisance goes, I share the view of Denning L.J. in the Court of Appeal that the appellants were not responsible for a private nuisance in any ordinary sense. What was done may possibly have constituted a public nuisance from which the respondents suffered special damage; but since it seems to be conceded that it would be a defence to such a claim to show that the discharge of oil was reasonably necessary to prevent loss of life in the ship's crew unless the appellants' own carelessness had brought about the danger of that loss, the essential issue comes round again to one of negligence. As to trespass, I am not prepared to say that I think that the appellants' action did constitute a trespass at all. Certainly I do not regard such decisions as *Jones* v. *Llanrwst Urban District Council* [7] and *Smith* v. *Great Western Railway Co.*[8] as having any real bearing on the circumstances of this case in which the oil was jettisoned at sea, committed to the action of wind and wave, with no certainty, so far as appears, how, when or under what conditions it might come to shore. But the issue of trespass was only touched upon before us, presumably because it was common ground that there would again be a good defence unless negligence were established.

As to the proof of negligence, I can summarize my view as follows. The respondents might have undertaken to make good their claim in more than one way. One way would have been to follow the line taken in *The Merchant Prince*,[9] upon which so much of the argument in this case has turned. That would have meant relying on the view that the mere fact that the ship had grounded on the training wall at all was evidence of negligence, and calling upon the appellants to discharge the onus of disproof thus placed upon them.. I do not think that we have sufficient material to enable us to say with certainty whether such an opening attack would have succeeded. Running a ship on to the training wall of a channel in the conditions of weather which prevailed at the time of the accident is at any rate not the same thing as running into a stationary vessel in the Mersey. But, assuming that the event was itself prima facie evidence of negligence and that the respondents had so framed their case, I do not doubt that the majority of the Court of Appeal were right in saying that the appellants would not have displaced that evidence by merely showing that their failure in navigation was due to a failure in the steering apparatus of the ship. They would have had to go further and show that they had not omitted any reasonable precaution to ensure that failures did not occur in their steering apparatus or in their control of the steering.

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[7] [1911] 1 Ch. 393; sub nom. *Isgoed Jones* v. *Llanrwst U. D. C.*, 27 T.L.R. 133.

[8] (1926) 135 L.T. 112; 42 T.L.R. 391.

[9] [1892] P. 179.

But the point is that the respondents did not undertake to make good their case on these lines. It is quite clear from the particulars which they were invited to furnish, and which they furnished, that they decided to rely on certain actions of the master in his navigation of the ship. He was careless, they said, in taking his ship into the channel when its steering apparatus was working so badly and/or when its stern frame, rudder and propeller had sustained damage. Knowing what he did about the conditions, he ought to have stayed outside, or called for a pilot or tug, or had the damage inspected and remedied before going in, or at any rate managed to navigate so as not to run into the wall. There were further grounds of complaint relating to the master's decision to jettison the oil, challenging the necessity or propriety of that decision. I find it impossible to read the statement of claim and the particulars without coming to the clear conclusion that, while the respondents were announcing it to be one of their heads of complaint that the master had brought his ship into the channel with defective control of steering, they were not putting it forward as a ground of complaint that the appellants, the shipowners, had allowed their ship to be at sea in such a defective condition. And that is what they now wish to complain of.

The respondents called evidence in chief, expert evidence, in support of their heads of claim. In their turn the appellants called their evidence upon these heads. The trial judge, after weighing the evidence, came to the conclusion that the respondents had not made good their case on any of the particulars. There, he thought, the case ended, and I am of the same opinion. I think it quite wrong that the respondents should, nevertheless, be entitled to say that the appellants must lose because they did not cover at the trial a range of evidence, how the stern frame came to break, the condition of the steering apparatus, the measures taken by the appellants to ensure that their ship and gear were in good order, which the respondents by their own pleading had excluded from the trial.

I am not unmindful that the respondents' counsel told us that he had conducted his case throughout on the lines of *The*

Merchant Prince[9] decision, although there did not seem to be unanimity between him and counsel for the appellants as to the stage at which what I will call *The Merchant Prince*[9] argument first appeared during the hearing. In my view, where the question is, as here, as to sufficiency of evidence, the state of the pleadings is of more importance than the way in which the case is shaped in argument. It is clear that no application was made to the trial judge to amend the pleadings by altering or extending the particulars, and it is equally clear from what he says at the close of his judgment that he did not regard himself as having expressly or impliedly authorized any such amendment. That being so, I am of opinion that the appellants called as much evidence as was required of them to defend themselves from the charges of negligence that were made in this case.

I agree that the appeal should be allowed.

Lord Tucker. My Lords, I agree that having regard to the issues raised in the pleadings it was not open to the Court of Appeal to substitute for the judgment of the trial judge in favour of the defendants a judgment in favour of the plaintiffs based upon the failure of the defendants to prove that the *Inverpool* was seaworthy when she left Liverpool on December 3, 1950.

I desire only to add a word or two about the alleged cause of action in trespass. I am inclined to agree with Denning L.J. that trespass does not lie on the facts of this case, as the discharge of the oil was not done directly on to the foreshore but outside in the estuary. Furthermore, it would seem from the decision in *Sharrod* v. *London and North Western Railway Co.*[10] that even if trespass would lie against the master, it would not have been available against the defendant company. Apart, however, from such considerations as these it is, in my view, well settled that, in actions between users of the highway and between the occupier of premises adjoining the highway which have been damaged by a person lawfully using the highway, the person who has suffered damage cannot recover in trespass in the absence of negligence on the part of the person who has caused the damage: see *per* Lord Blackburn in *River Wear Commissioners* v. *Adamson*,[11] where he says: "My Lords, the common law is, I think, "as follows:—Property adjoining to a spot on which the public "have a right to carry on traffic is liable to be injured by that "traffic. In this respect there is no difference between a shop,

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[9] [1892] P. 179.

[10] (1849) 4 Exch. 580.

[11] (1877) 2 App.Cas. 743, 767.

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"the railings or windows of which may be broken by a carriage "on the road, and a pier adjoining to a harbour or a navigable "river or the sea, which is liable to be injured by a ship. In "either case the owner of the injured property must bear his "own loss, unless he can establish that some other person is in "fault, and liable to make it good." This was the principle applied by McCardie J. in *Gayler & Pope Ltd.* v. *B. Davies & Son Ltd.*[12] in rejecting the contention that the plaintiffs in that case could succeed in trespass in the absence of negligence.

Appeal allowed.

Solicitors: *Thomas Cooper & Co.; Sharpe, Pritchard & Co.*

F. C.

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[12] [1924] 2 K.B. 75; 40 T.L.R. 591.

[HOUSE OF LORDS.]

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Oct. 17, 18; *Dec.* 12.

INSTITUTE OF FUEL . . . . . APPELLANT;

AND

MORLEY (VALUATION OFFICER) AND ANOTHER . . . . . . RESPONDENTS.

Rates and Rating—Scientific society—Exemption—Society to promote fuel technology—Scientific purpose—Benefit of members—Ancillary purpose—Whether "instituted for purposes of science . . . exclusively"—Scientific Societies Act, 1843 (6 *&* 7 *Vict. c.* 36), *s.* 1.

The Institute of Fuel was incorporated in 1946 by Royal Charter, paragraph 7 setting out its purposes: "(a) To promote, foster, "and develop the general advancement of the various branches "of fuel technology as an end in itself, and as a means of "furthering the more scientific and economic utilization of fuel "of all kinds for industrial, commercial, public, agricultural, "domestic, transport and/or other purposes, and to promote, assist, "finance and support such industrial and scientific research, "investigation, and experimental work in the economical treatment "and application of fuel as the institute may consider likely to "conduce to those ends, and to the benefit of the community at "large . . . (d) To uphold the status of members of the institute by

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* *Present*: EARL JOWITT, LORD MORTON OF HENRYTON, LORD RADCLIFFE, LORD TUCKER and LORD COHEN.

"holding or prescribing examinations for candidates for election and "by requiring standards of knowledge and experience which can "be approved . . ." The institute occupied premises in London:—

Held, that the institute was "instituted for the purposes of "science . . . exclusively" within section 1 of the Scientific Societies Act, 1843, and was accordingly exempt from rates. Any advantages enjoyed by the members were ancillary to the advancement of the science of fuel technology.

Institution of Civil Engineers v. *Inland Revenue Commissioners* [1932] 1 K.B. 149; 47 T.L.R. 466, and *Inland Revenue Commissioners* v. *Forrest* (1890) 15 App.Cas. 334; 6 T.L.R. 456 applied.

Decision of the Court of Appeal [1955] 1 Q.B. 317; [1955] 1 All E.R. 161 reversed.

APPEAL from the Court of Appeal (Evershed M.R. and Birkett L.J., Jenkins L.J. dissenting).

This was an appeal from an order of the Court of Appeal made of December 15, 1954 (after a hearing which took place on November 10 and 11, 1954), dismissing an appeal by the appellant, the Institute of Fuel, by way of case stated pursuant to section 3 (4) of the Lands Tribunal Act, 1949, and R.S.C., Ord. LVIII B, r. 2, from a decision of the Lands Tribunal given on March 20, 1954. The decision of the Lands Tribunal was given on an appeal by the appellant from a decision of the Local Valuation Court of the North West London Local Valuation Panel given on July 8, 1953, directing that in accordance with a proposal made by the first respondent, Thomas Walter Morley (Valuation Officer), on February 20, 1953, the valuation list for the St. Marylebone Borough Rating Area should be altered by the insertion therein of the following assessment of a hereditament: "Office and premises (basement, ground floor, first and "second floors), 18 Devonshire Street, W.1. £365 gross value, "£301 rateable value." The office and premises were at all material times occupied by the institute. The second respondent was the St. Marylebone Metropolitan Borough Council.

The institute was incorporated by Royal Charter on August 12, 1946. The first recital showed that an association or institute incorporated under the Companies Acts, 1908–1917, and known as the Institute of Fuel had petitioned for a charter of incorporation, and paragraph 1 provided as follows: "The persons now "members of the said association or institute known as the "Institute of Fuel (hereinafter called 'the existing institute'), "and all such persons as may hereafter become members of the "body corporate hereby constituted . . . and their successors, "shall for ever hereafter (so long as they shall continue to be "such members) be by virtue of these presents one body corporate and politic by the name of 'The Institute of Fuel'", . . .

Paragraph 5 provided: "The income and property of the "institute shall be applied solely towards the promotion of the "objects of the institute, and forbids the institute to carry on any "trade or business or engage in any transaction with a view to "the pecuniary gain or profit of the members thereof."

Paragraph 6, while prohibiting the receipt of any profit by members, provided that "nothing herein contained shall prevent ". . . the giving of privileges to the members of the institute."

Paragraph 7 was in the following terms: "The objects "and purposes for which the Institute of Fuel is hereby "constituted are:—(*a*) To promote, foster, and develop the "general advancement of the various branches of fuel technology as an end in itself, and as a means of furthering "the more scientific and economic utilization of fuel of all kinds "for industrial, commercial, public, agricultural, domestic, "transport and/or other purposes, and to promote, assist, "finance and support such industrial and scientific research, "investigation, and experimental work in the economical treatment and application of fuel as the institute may consider "likely to conduce to those ends, and to the benefit of the "community at large. (*b*) To hold meetings in London and at "established provincial centres for the reading and discussion "of papers, to issue regularly a technical journal, to join with "other institutions in promoting objects of mutual interest, and "generally to take such a prominent and active part in the "advancement of the knowledge and practice of fuel technology "as its status requires. (*c*) To co-operate with government "departments, universities, educational institutions, associations, "companies, or individual persons in establishing or maintaining "any investigation or research relating to any branch of fuel "technology. (*d*) To uphold the status of members of the "institute by holding or prescribing examinations for candidates "for election and by requiring standards of knowledge and "experience which can be approved. (*e*) To print and publish, "sell, lend and distribute any communications made to the "institute or any similar society, and any reports of the proceedings or transactions of the institute or any similar society, "and to produce, purchase, reproduce, print, publish and distribute any other books, papers, treatises or communications "relating to fuel technology and to establish and maintain a "library. (*f*) To invite foreign delegates to attend any meetings,

" conferences or functions promoted or supported by the " institute and to defray or contribute to their expenses; to defray " or contribute to the expenses of any duly appointed officials or " representatives of the institute attending any foreign scientific " meetings or conferences at the request of the council of the " institute, and to translate, print, publish and distribute any " books, communications, papers or proceedings or abstracts or " extracts thereof which are of scientific interest. (*g*) To provide " facilities for conferences and functions in support of the " objects of the institute. (*h*) To do all other things incidental " or conducive to the attainment of the above objects or any of " them."

Paragraph 14 set out the classes into which the corporate members of the institute were to be divided, and paragraph 15 authorized the use by several classes of members of certain distinguishing initials after their names.

Paragraph 16 provided that: " The qualifications, method and " terms of admission, privileges and obligations, including liability " to expulsion or suspension " of members of the various classes respectively, " shall be such as the bye-laws for the time being " of " the institute shall direct.

Paragraph 19 provided that: " The corporate members or the " majority of such members present in person and voting at any " duly convened special general meeting . . . shall have power " from time to time to make such bye-laws of the institute as " to them shall seem requisite and convenient for the regulation, " government and advantage of the institute, its members " and property and for the furtherance of the objects and " purposes of the institute." There followed a proviso that no such bye-law should take effect until it had been allowed by the Lords of the Privy Council.

Paragraph 20 provided that the first bye-laws to be made under the charter should be made within six months from the date thereof.

Paragraph 21 was as follows: " Pending the making and " approval of the bye-laws to be made under these presents but " no longer the articles of association and bye-laws of the existing " institute shall be the bye-laws of the institute so far as the " same may be applicable and shall have effect as though the " institute, its officers and members had therein been referred to " throughout in lieu of the existing institute, its officers and " members."

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The bye-laws, made on January 22, 1947, in pursuance of paragraph 19, were allowed by the Privy Council on June 5, 1947.

The question, as set out in the case stated by the Lands Tribunal, was whether that tribunal "came to a correct decision "in point of law in holding that the appellant institute is not "a 'society instituted for the purposes of science exclusively' "within the meaning of section 1 of the Scientific Societies Act, "1843."

M. E. Rowe Q.C. and *F. A. Amies* for the appellant institute. On the true construction of its charter, the institute is a society instituted for the purposes of science exclusively, within the meaning of section 1 of the Scientific Societies Act, 1843, and accordingly it is exempt from being rated in respect of the premises in question. Its sole and exclusive purpose is the advancement of fuel technology as expressed in paragraph 7 (*a*) of the charter; this is a scientific purpose within the Act: see also paragraph 7 (*b*).

A general statement of the principles to be applied in construing the constitutions of societies claiming exemption under this Act is found in *Metropolitan Borough of Battersea* v. *British Iron and Steel Research Association.*[1] These principles are correct and are in accordance with those laid down by the House of Lords in the case of other Acts. The same sort of question arose in *Institution of Civil Engineers* v. *Inland Revenue Commissioners*[2] and *Royal College of Surgeons of England* v. *National Provincial Bank Ltd.*[3]

Bye-laws 6, 7, 9, 11, 12, 13 and 50 of the current bye-laws indicate professional advantages attributable to membership, but these are ancillary to the objects of the institute and are not themselves objects. These advantages and all the powers of the institute are ancillary to its scientific objects.

The other relevant authorities are *Reg.* v. *Institution of Civil Engineers*[4]; *In the Matter of Duty on the Estate of the Institution of Civil Engineers*[5]; *Inland Revenue Commissioners* v. *Forrest*[6]; and *Royal College of Music* v. *Vestry of St. Margaret's and St. John's, Westminster.*[7]

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[1] [1949] 1 K.B. 434, 451; 65 T.L.R. 183.

[2] [1932] 1 K.B. 149; 47 T.L.R. 466.

[3] [1952] A.C. 631; [1952] 1 T.L.R. 978; [1952] 1 All E.R. 984.

[4] (1879) 5 Q.B.D. 48.

[5] (1888) 20 Q.B.D. 621.

[6] (1890) 15 App.Cas. 334; 6 T.L.R. 456.

[7] [1898] 1 Q.B. 304, 809; 14 T.L.R. 136, 351.

Paragraph 7 (*a*) does not express a second separate non-scientific object. The whole expresses a scientific object and that is the object of the institute. Paragraph 7 (*d*) is merely designed to ensure that members shall attain the requisite scientific standard. Under it the institute does nothing that is not designed to ensure that members are fully qualified. In this respect it does the same thing as the Royal College of Surgeons and the Institution of Civil Engineers.

The mere fact that powers are expressed in an objects clause does not prevent them from being incidental. That was the case in *Metropolitan Borough of Battersea* v. *British Iron and Steel Research Association.*[8]

The claim to exemption is established.

M. L. Lyell Q.C. and *Patrick Browne* for the respondents. The cases cited by the appellants deal with the wording of particular charters and the construction of particular words. In *In the Matter of Duty on the Estate of the Institution of Civil Engineers*[9] there was nothing in the relevant words about the interests of the members. In *Royal College of Surgeons of England* v. *National Provincial Bank Ltd.*[10] the majority of the House held that all the purposes of the college were stated in the recitals to the charter. The only references to the interests of the members were in parts of the constitution not dealing with objects. These cases are distinguishable. See also *Oxford Group* v. *Inland Revenue Commissioners*[11] and *Inland Revenue Commissioners* v. *Glasgow City Police Athletic Association.*[12]

Paragraph 7 (*a*) expresses two purposes. It starts with a scientific object, but the other purpose is commercial. The first purpose is treated as a means to the second. A purpose is to be achieved by the means of science. It is not every technical development that is directed to the purposes of science. To know how to drive a car does not make one more scientifically knowledgeable; one may only know that certain things happen if one twists certain knobs. The same is true of a wireless or television set.

Paragraph 7 (*b*) relates to the professional practice of fuel technology and neither assists nor damages the respondents' argument, though the word " technical " there means something more than scientific.

[8] [1949] 1 K.B. 434.

[9] 20 Q.B.D. 621, 628.

[10] [1952] A.C. 631, 641, 654, 661, 664.

[11] [1949] 2 All E.R. 537, 545; 31 T.C. 221, 255.

[12] [1953] A.C. 380, 382, 396; [1953] 2 W.L.R. 625; [1953] 1 All E.R. 747.

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Paragraph 7 (*d*) is especially relied on. It is not the status of the institute which it is intended to uphold, but that of the members. "Approved" as used there refers to approval of the members by the public so that they obtain profitable employment, viz., approval by their customers, industrialists and the like. This points straight to advancing members in their profession. It is not an unsought consequence but an essential object expressly sought. This appears also from a reading of paragraphs 6, 14 and 19 and of the bye-laws, though admittedly these cannot be used in construing the charter. See also *Metropolitan Borough of Battersea* v. *British Iron and Steel Research Association.*[13]

In section 1 of the Act of 1843 the word "exclusively" means what it says, and though the institute is instituted partly for purposes of science it is not instituted exclusively for them. Otherwise it fulfils all the requirements of the section.

M. E. Rowe Q.C. in reply. In paragraph 7 (*d*) "approved" refers to approval by the institute as a qualification for membership. Paragraph 7 (*a*) deals with knowledge in the purely scientific part and promotion in the application of that scientific knowledge. Everything that follows is tied to the opening words of paragraph 7 (*a*). See *In the Matter of Duty on the Estate of the Institution of Civil Engineers.*[14]

Their Lordships took time for consideration.

Dec. 12. EARL JOWITT. My Lords, I have had an opportunity of reading in print the speech which my noble and learned friend, Lord Morton of Henryton, is about to deliver. I agree with his conclusion and with his reasoning, and find it unnecessary to add any comments of my own.

LORD MORTON OF HENRYTON. My Lords, the question arising on this appeal, as set out in the case stated by the Lands Tribunal, is whether that tribunal "came to a correct decision "in point of law in holding that the appellant institute is not a "'society instituted for purposes of science exclusively' within "the meaning of section 1 of the Scientific Societies Act, 1843." It is claimed by the appellant institute that it is such a society and is therefore exempted by the section from being assessed or rated in respect of an office and premises occupied by it at 18, Devonshire Street, W.1. The majority of the Court of

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[13] [1949] 1 K.B. 434, 454.

[14] 20 Q.B.D. 621, 622.

Appeal (the Master of the Rolls and Birkett L.J., Jenkins L.J. dissenting) rejected the institute's claim and upheld the decision of the Lands Tribunal. Hence this appeal.

Section 1 of the Scientific Societies Act, 1843, so far as relevant provides as follows:—" No person or persons shall be " assessed or rated, or liable to be assessed or rated . . . to " any . . . local rates . . . in respect of any land, houses, or " buildings, or parts of houses or buildings, belonging to any " society instituted for purposes of science, literature, or the fine " arts exclusively, either as tenant or as owner, and occupied by " it for the transaction of its business, and for carrying into effect " its purposes, provided that such society shall be supported " wholly or in part by annual voluntary contributions, and shall " not, and by its laws may not, make any dividend, gift, division " or bonus in money unto or between any of its members, and " provided also that such society shall obtain " a certificate therein mentioned. It is accepted by the respondents that the institute is instituted for purposes of science and that it satisfies all the requirements of the section except the requirement that it shall be instituted for purposes of science *exclusively*. They contend that, though it is in part instituted for such purposes (namely, for purposes of fuel technology which they concede to be purposes of science within the meaning of the section) the institute was also instituted in part for other purposes which are not purposes of science.

[His Lordship read the relevant provisions of the charter and continued:] In the course of the argument reference was made to the present bye-laws of the institute, which were made some months after the date of the charter, under the powers conferred by paragraph 19. My Lords, if it had been suggested that it was relevant for the decision of this case to consider what were the activities of the institute at any time subsequent to the grant of the charter, and if your Lordships had accepted that suggestion, the bye-laws so made might possibly have thrown some light on the matter. But the only question which has been argued upon this appeal is whether the purposes for which the institute was originally instituted were or were not exclusively scientific. I do not see how your Lordships can be assisted on this particular question by a consideration of bye-laws made after the grant of the charter. It might have been possible to gain some assistance from the bye-laws mentioned in paragraph 21 of the charter, which were existing at the date of the charter and were given temporary effect thereby; but these bye-laws were not brought to your Lordships' attention and I conclude that neither party thought that they could assist the House.

I now turn to consider the terms of the charter, and in particular paragraph 7, which sets out the objects and purposes for which the institute was constituted. Sub-paragraph (*a*) was the subject of much argument on both sides. In my view, it states the main purpose of the institute, and I can best state my conclusion as to its effect in the words of Jenkins L.J.[1]: "The sub-paragraph, as a matter of construction, prescribes one "object only, namely, the advancement of fuel technology, and "goes on to say, in effect, that this object is to be pursued not "merely as an end in itself (that is, for the purpose of increasing "the sum of academic or laboratory knowledge pertaining to this "science) but also in order that the fuel-using public may benefit "from the new and improved methods of fuel utilization, which "the advancement of the science by the institute may be "expected to produce. In other words, the institute is not only "to increase this department of scientific knowledge, but also "to make known to the world and available for public use the "knowledge thus gained. The rest of sub-paragraph (*a*), which "relates to industrial and scientific research, investigation and "experimental work in the economical treatment and application of fuel, is, I think, clearly no more than ancillary to the "advancement of fuel technology."

Mr. Lyell, for the respondents, submitted that the sub-paragraph stated two purposes, whereof the first was scientific and the second was of a commercial nature. I think it is quite possible to read (*a*) as stating two purposes, one beginning with the words "to promote, foster, and develop" and the other with the words "to promote, assist, finance and support." In my view, however, such a subdivision does not assist the respondents, as each of the two purposes so stated is to my mind a scientific purpose. I cannot find in either of them any suggestion that the institute can embark on any commercial pursuit; they are both confined to the acquisition of knowledge in the realm of fuel technology, which is admittedly a science, and to the spread of such knowledge for the benefit of the community.

I regard sub-paragraphs (*b*) and (*c*) as being merely ancillary to the main purpose or purposes stated in (*a*). It was suggested that the concluding words of (*b*) were ambiguous, as "its status" might refer either to the status of the institute or to the status

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[1] [1955] 1 Q.B. 317, 340; [1955] 1 All E.R. 161.

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of the knowledge or practice of fuel technology. I cannot doubt that the former is the correct view, but on either view (*b*) remains, to my mind, purely ancillary.

Mr. Lyell relied strongly on sub-paragraph (*d*). He submitted that this sub-paragraph, read in conjunction with other paragraphs and in particular with paragraphs 6, 14 and 19, stated in effect that one purpose of the institute was to benefit its members in their profession of fuel technologists. In support of this submission he invited your Lordships to read the concluding words " which can be approved " as referring to approval by the public, the intent being that the public should be led to approve of the members of the institute, and to give them profitable employment. I do not so read these words. In my opinion, they refer to approval by the institute. If the institute is to pursue efficiently the scientific purposes stated in (*a*), it is plainly necessary that its members should attain standards of knowledge and experience which the institute can approve. It is in this sense and for this purpose that the status of members is to be upheld and I cannot give to this sub-paragraph, read in conjunction with the charter as a whole, the meaning for which Mr. Lyell contends.

Many passages in judgments bearing upon this matter were cited in the course of the argument. I would apply to the present case the words of Lord Hanworth M.R. in *Institution of Civil Engineers* v. *Inland Revenue Commissioners* [2]: " That " its members should bring a certain knowledge and capacity for " learning to the institution seems only to confirm its purpose " of the general advancement of mechanical science and " knowledge."

My Lords, I am ready to assume that to be a member of the institute is an advantage from a professional and pecuniary standpoint. But in my view that advantage is no more than " an incidental, though an important and perhaps a necessary " consequence of the way in which the institution does its work " in the pursuit of science," to use the words of Lord Macnaghten in *Inland Revenue Commissioners* v. *Forrest*.[3]

Sub-paragraphs (*e*), (*f*), (*g*) and (*h*) are, to my mind, ancillary and require no comment.

For these reasons I am of opinion that the Lands Tribunal came to an incorrect decision and I would allow the appeal.

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[2] [1932] 1 K.B. 149, 162; 47 T.L.R. 466.

[3] (1890) 15 App.Cas. 334, 354; 6 T.L.R. 456.

LORD RADCLIFFE. My Lords, I agree that this appeal should be allowed.

LORD TUCKER. My Lords, it having been conceded that byelaws made subsequent to the date of the charter cannot be used for the purpose of construing the charter—a concession which, in my opinion, was rightly and necessarily made—your Lordships are, I think, concerned only with sub-paragraphs (*a*) and (*d*) of paragraph 7 of the charter. Some reference was made to other provisions of the charter, but they do not, in my view, afford any assistance. These two sub-paragraphs are as follows:—[His Lordship read the sub-paragraphs and continued:] Sub-paragraph (*a*) is, I think, expressed with unnecessary elaboration and in the end adds little, if anything, to the opening words, viz., "To promote, foster, and develop the general advancement of "the various branches of fuel technology." I am quite unable to construe the words which follow "and as a means of" as constituting a commercial purpose so as to prevent the institute from being held to have been instituted exclusively for purposes of science. As regards sub-paragraph (*d*), I agree with Jenkins L.J. that its purpose is plain, namely, to ensure that membership of the institute shall be confined to persons who have attained a suitable degree of proficiency in the field of fuel technology which, whether it be regarded as a separate object or not, is purely ancillary to the object expressed in sub-paragraph (*a*).

This case, as it seems to me, depends solely on the construction of a particular charter, and I have not, therefore, thought it necessary to refer to the authorities which were cited in argument.

I agree that the appeal should be allowed.

LORD COHEN. My Lords, I had written some observations in this matter, but since doing so I have had the opportunity of reading in print the speech which has been delivered by my noble and learned friend, Lord Morton of Henryton. I find myself so completely in agreement with his reasoning and with that of Jenkins L.J. in the Court of Appeal that I am content to say only that I agree that the Lands Tribunal came to an incorrect conclusion. I, too, would allow the appeal.

Appeal allowed.

Solicitors: *Philip Conway, Thomas & Co.; Solicitor of Inland Revenue and Sharpe, Pritchard & Co.*

J. C.*

1955
Dec. 14.
1956
Jan. 24.

KARAMAT . . . . APPELLANT;

AND

THE QUEEN . . . . RESPONDENT.

ON APPEAL FROM THE COURT OF CRIMINAL APPEAL OF BRITISH GUIANA.

Criminal Law—Practice—Trial—View by jury of locus in quo—Presence of judge desirable—Control of conduct of proceedings—Presence of witnesses who had already given evidence—Unobjectionable—Absence of accused—Effect—Murder—Criminal Law (Procedure) Ordinance (Laws of British Guiana, 1930, *c.* 18), *ss.* 44, 167 (2). *British Guiana.*

During the course of the trial of the appellant on a charge of murder, and before the case for the prosecution was finally closed, the judge, pursuant to the powers conferred by section 44 of the Criminal Law (Procedure) Ordinance of British Guiana, which also provided that the practice and procedure in criminal trials, including that relating to juries, should conform as nearly as possible to that which obtained in England, directed a view of the locality. At the view witnesses who had already given evidence at the trial were present, and any juror who wanted to ask a question put it through the judge, who was present the whole time and throughout had control of the proceedings, and the witness gave a demonstration as the answer, counsel being then invited by the judge to ask questions through him, but no cross-examination was allowed. The appellant had stated that he did not wish to attend the view, and he did not. On appeal by him against his conviction on the ground, inter alia, that the "view" was not one authorized by the Ordinance when witnesses attended and indicated places by pointing or by words:—

Held, dismissing the appeal, that witnesses who had already given evidence could attend at the view; they took part in it in the sense of placing themselves in the positions in which they said they had been at the material times or indicating the positions of others, and that was unobjectionable—there was nothing to show that any more than that took place. If a view were ordered at some stage of a criminal trial in England, it would be no objection to a witness attending and taking part that he had already given evidence.

A view was part of the evidence; it was in substitution for or supplemental to plans, photographs and the like. It was eminently desirable that the judge should be present. So long as the witnesses taking part were recalled to be cross-examined, if desired, the accused person was not in any way prejudiced, but it was essential that every effort should be made to see that witnesses made no communication to the jury except to give a demonstration.

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* *Present*: LORD GODDARD (Lord Chief Justice), LORD TUCKER and LORD SOMERVELL OF HARROW.

Reg. v. *Martin and Webb* (1872) L.R. 1 C.C.R. 378; 26 L.T. 778 considered.

Further, the absence of the appellant from the view afforded no ground of objection, for the holding of the view was part of the trial and under section 167 (2) of the Criminal Law (Procedure) Ordinance the court had power to allow the accused—as it did here—to be absent during part of the trial. In addition, if an accused person declines to attend a view he cannot afterwards raise the objection that his absence of itself made the view illegal and a ground for quashing the conviction, if one follows, though he could object if any evidence were given outside the scope of the view as ordered.

Judgment of the Court of Criminal Appeal of British Guiana affirmed.

APPEAL (No. 22 of 1955), by special leave, from a judgment of the Court of Criminal Appeal in the Supreme Court of British Guiana (Bell C.J., Boland and Stoby JJ.) (February 24, 1955) dismissing the appellant's appeal from his conviction on a charge of murder before Hughes J. and a jury at the Criminal Sessions for the County of Demerara (September 16, 1954).

The appellant was indicted with five other persons, all of whom were acquitted, for the murder of Haniff Jhuman, who occupied land which adjoined that on which the appellant and members of his family and other relations lived and farmed. There had been frequent disputes between the occupants of the two estates arising out of cattle trespass, and undoubtedly there was much ill-feeling between them. There were a series of events and quarrels during September 26, 1953, and the early part of the 27th, and after a fight in the morning of the latter day it was alleged by the Crown that the appellant obtained a twelve-bore gun and two cartridges. Later in the day, when the deceased man with others approached a cow pen, the appellant, who was engaged in milking, shot at Haniff and killed him and also shot at and killed the latter's mother. The appellant's defence in the main was that he shot in self-defence, while the others who were indicted with him rested their case on an alibi, contending they were not present when the shooting took place.

There had been, before the end of the case for the Crown, a view of the locus in quo by the jury, and the basic submission on this appeal was that the view allowed nine prosecution witnesses, who had already given evidence, and been cross-examined and re-examined and then remained in court and so heard the evidence of subsequent witnesses, to give further evidence both orally and by conduct before the jury. The appellant did not attend the view.

1955. Dec. 13, 14. *Bernard Gillis Q.C.* and *J. Lloyd-Eley* for the appellant. The evidence tendered by the Crown, it would be idle not to concede, was most substantial, being in large measure accepted by the jury. The first and main ground of this appeal, however, is that the view proceedings, purporting to be pursuant to section 44 of the Criminal Law (Procedure) Ordinance of British Guiana, were entirely irregular in law and were of a nature so wholly disregarding the proper protection which an accused person is entitled to as to come within the established principles laid down in *In re Dillet* [1] and *Ibrahim* v. *The King.*[2] Witnesses, whose evidence was the main substantial evidence of the killing alleged against the appellant, having been examined, cross-examined and re-examined and released from the witness stand, took their place in the court, where, of course, they heard the testimony of the witnesses who followed. Those first witnesses, despite the objection of all counsel for the accused, were in effect allowed at the view to give evidence again, in the absence of the accused, by words and demonstrations—a repetition of the evidence in an altered form. Secondly, in the course of the view the jury mixed with the witnesses; there is by no means certainty that the jury were present at the various demonstrations; there was no checking over by reliable means of their presence; and at one stage the jury were broken into various groups where the witnesses were talking. Admittedly, there was no precise finding of anything being said which was in fact prejudicial other than what the witnesses purported to state in regard to their evidence. Those are matters sufficient to establish the conduct complained of, and the proceedings themselves were of such a character as to destroy the validity of the trial.

There is no authority which permits a witness after he has given his evidence to say anything to the jury at all. There are no cases of witnesses in a criminal trial having been allowed to speak or do anything comparable to that which took place in British Guiana. There is no power in the judge under the Ordinance to allow questioning at the view and the giving of answers. The proceedings were no part of the trial in the sense in which that term is ordinarily used and understood. The jury were permitted to receive information, in the absence of the accused, and with no record of what was said at the time—one has only their recollection. [Reference was made to *Mahlikilili Dhalamini* v. *The King*,[3] *Tumahole Bereng* v. *The King*[4] and *Reg.* v. *Whalley*.[5]] What was done here was entirely without precedent in this country. It contained within it irregularities which removed from the prisoner the undoubted right to be tried according to law. That the jury should be given an opportunity of hearing the evidence repeated should not commend itself to this Board; it gives the Crown an opportunity to present its case twice. Because this case was outside the United Kingdom greater vigilance should be used to adhere to the established rules.

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[1] (1887) 12 App.Cas. 459.

[2] [1914] A.C. 599; 30 T.L.R. 383.

Far from *Reg.* v. *Martin and Webb*[6] being any sort of authority which supports what was done here, it is perhaps the only near authority for the contrary view. Some support can be gathered from what Somervell L.J. said in *Goold* v. *Evans & Co.*[7]: it is a stronger situation in a criminal case where the presence of a representative cannot take the place of the presence of the prisoner. If what took place at the view is evidence, it is in the absence of the accused; if it is not evidence in law, it is irregular because it is placing information before the jury in circumstances for which there is no proper provision in law: one cannot have it both ways. *London General Omnibus Co. Ltd.* v. *Lavell*[8] supports the submission that what takes place at a view is not evidence: the tribunal goes to the view for the better understanding of the evidence which, of course, it receives in a proper court. *Smith* v. *Neild*[9] shows, too, that a view is not an extended opportunity for the giving of evidence. Likewise, the Canadian case of *Bennett* v. *Smith*[10] showed that nothing approaching evidence should be given at a view, and certainly not in the absence of a party. *MacDonald* v. *Goderich*,[11] also a Canadian case, further supports the proposition that a view is to enable evidence to be understood, but is not itself evidence. There are two English cases which show the strict way in which in early years the courts approached a view in criminal cases—they were unwilling that the jury should have anything before them which might trespass upon what they should properly have before them when they considered their decision: *Rex* v. *Redman*[12]; *Anonymous*.[13]

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[3] [1942] A.C. 583; [1943] 1 All E.R. 463.

[4] [1949] A.C. 253.

[5] (1847) 2 Car. & K. 376; 2 Cox C.C. 231.

[6] (1872) L.R. 1 C.C.R. 378; 26 L.T. 778.

[7] [1951] 2 T.L.R. 1189.

[8] [1901] 1 Ch. 135; 17 T.L.R. 61.

[9] (1889) 10 N.S.W. 171.

[10] (1877) 17 N.B.R. (1 P. & B.) 27.

[11] [1948] 1 D.L.R. 11.

[12] (1756) Sayer 303.

[13] (1815) 2 Chitty 422.

Summarizing: (1) The Ordinance permits a view, but a view does not consist of the presence of witnesses and the giving of information by means of a demonstration; it affords an opportunity for the jury to see the place so that they may better apprehend the evidence duly given to the court. (2) There is no provision in the Ordinance for the prosecution witnesses to be heard or seen again by the jury once they have concluded their evidence. (3) If what happened here was the giving of information, it was unsworn, and was not recorded in terms anywhere. (4) If it be evidence, it was in the absence of the accused; if it be not evidence, it was an unauthorized communication by witnesses to the jury, and in both cases rendered the proceedings invalid. (5) The jurors and witnesses were associated, and that in itself is sufficient for present purposes. There was conversation between witnesses and jury.

The Court of Criminal Appeal in British Guiana had power to order a new trial: Criminal Appeal Ordinance, No. 29 of 1950, s. 6 (2). What happened here was of likely prejudice to the accused, and was much more grave than what was complained of in *Seneviratne* v. *Reg.*[14] If what was done here is to commend itself to the Board, then the principle of keeping the jury in itself loses some of its historic validity.

Lloyd-Eley following. There are cases in which a jury has been discharged on the ground that they have been talking to witnesses; but there appears to be no case in which a verdict has been set aside because they have spoken to witnesses in the stage before they retired. It is submitted, on the basis of such decisions as *Smith* v. *Neild*,[15] that if the jury communicated with any outside person the verdict must be set aside. [Reference was also made to *Rex* v. *Twiss*[16] and *Reg.* v. *St. George*.[17]]

J. G. Le Quesne for the Crown. It was said that it was a fundamental defect in a criminal proceeding for evidence to be heard in the absence of the accused. Section 167 (2) of the Criminal Law (Procedure) Ordinance provides, however, that the court may, if it thinks proper, permit the accused person to be out of court during the trial or any part of it. What happened in this case was entirely within section 167 (2): the appellant through his counsel asked the judge to be allowed to be absent while part of the trial went on, assuming for this purpose that the view was a part of the trial, and the judge, not having insisted on his presence, it must be implied that he allowed him to be absent. That disposes of any difficulty that might otherwise arise as regards the absence of the appellant. There is some conflict on the authorities whether a view is to be described as part of the evidence. It is not sought to deny that the view proceedings here should be regarded, for the purposes of the protection of the accused, as evidence.

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[14] [1936] 3 All E.R. 36.

[15] 10 N.S.W. 171.

[16] [1918] 2 K.B. 853; 35 T.L.R. 3; 13 Cr.App.R. 177.

[17] (1840) 9 C. & P. 483.

The attack on the view has been largely based on the fact that the witnesses were allowed to go there and were permitted to make representations both by speech and by action. *Reg.* v. *Martin and Webb*,[18] rightly understood, goes far to support what happened in this case, and to show that it was a proper proceeding. If that be so, this view was conducted in a way which was necessary if it was to be of use to the jury. Here, as was permissible, the jury were allowed to separate each night, and that being so it cannot be correct to say that the possibilities of separation and communication on a view like this are such that the conviction can be quashed. [*Rex* v. *Taylor* [19] was referred to.]

Gillis Q.C. replied.

1955. Dec. 14. LORD GODDARD announced that their Lordships would humbly advise Her Majesty that the appeal should be dismissed and that they would give their reasons later.

1956. Jan. 24. The reasons of their Lordships for dismissing the appeal were given by LORD GODDARD. This was an appeal, by special leave, from a judgment of the Court of Criminal Appeal in British Guiana dismissing the appellant's appeal against a conviction for murder after a trial before Hughes J. and a jury which, their Lordships were told, had lasted some 14 days. At the close of the argument their Lordships announced that they would humbly advise Her Majesty to dismiss the appeal and now give their reasons for the advice which they tendered.

[His Lordship stated the facts and continued:] The case involved the calling of a large number of witnesses, many, if not all, of them other than the police were, as is evident from the transcript of their evidence, illiterate and of low intelligence with a very poor command of the English language, a class no doubt with whom the judges in the Colony are quite accustomed to deal in their courts. It is unnecessary for their Lordships to deal with the evidence in any detail because the case before the

[18] 26 L.T. 778.

[19] [1950] N.I. 57.

Board was in substance confined to one matter relating to a view which took place during the hearing. Suffice it to say that not only were there numerous witnesses, but a good deal depended on the locality of the crime and where the various witnesses were at the times to which they spoke in their evidence. During the course of the trial, and before the case for the prosecution was finally closed, all counsel concerned applied to the judge to direct a view of the locality. It is quite clear from the record for what purpose a view was desired and the reason why the judge granted the application. It was so that the witnesses might indicate to the jury the positions at which they alleged they were at the material times and the direction from which others approached the scene of the shooting, and to test the opportunity afforded for identification. The Criminal Law (Procedure) Ordinance of British Guiana provides that the judge, if he considers it to be in the interest of justice, may direct that the jury have a view of any place, person or thing connected with the case upon the terms and conditions which seem to him proper. It is also provided that the practice and procedure in criminal trials, including the practice and procedure relating to juries, should conform as nearly as possible to that which obtains in England. When counsel applied for a view, counsel for the present appellant and counsel appearing for two of the other prisoners submitted that none of the witnesses who had already given evidence should be allowed to attend the view or to indicate any of the points referred to in their evidence. Counsel for two other of the prisoners did not join in this objection, and it was disallowed by the judge. He asked the jury to indicate which of the witnesses they desired to attend and indicate positions, and stated that counsel would have full opportunity to recall and cross-examine any witness on any matter arising from the view. The jury did intimate the witnesses whom they desired should be present, and the judge said that the defence might wish some of their witnesses to attend to point out particular places though they had not yet been called. He gave no direction that they were to attend; he only gave permission for them to do so if the defence desired it. Thereupon the appellant's counsel declined to take any part in the view or to cross-examine any of the witnesses who attended, and he informed the court that his client would not attend. The counsel did himself go to the view as the appellant's representative, but took no active part in the proceedings there nor did he subsequently cross-examine any of the witnesses when they were recalled after the view was held.

The first submission on behalf of the appellant is that a "view" ceases to be a view and is not authorized by the Ordinance if witnesses attend and indicate places by pointing or by words. Their Lordships do not accept this submission. In their opinion the judge was perfectly right in deciding that witnesses who had given evidence could attend at the view. In fact there was every reason why they should, and it was just those witnesses from whom the jury would desire to get ocular demonstration of their positions at the material times. It would or, at least, might enable the jury to understand the evidence they had given. As the Chief Justice pointed out in giving the judgment of the Court of Criminal Appeal, the average witness in the Colony is not as capable of giving intelligible descriptions of places as, generally speaking, are witnesses in the English courts. As already pointed out, these witnesses were illiterate, and no doubt would have difficulty in explaining themselves and probably considerable difficulty in following a plan, a difficulty often experienced with witnesses in this country if in a humble station of life. To have held a view in their absence would have destroyed its whole value, for it would not have demonstrated to the jury just what they wanted to know. If a view were ordered at some stage of a criminal trial in England, their Lordships are of opinion that it would be no objection to a witness attending and taking part that he had already given evidence. It might well be that it was for that very reason that a view would be valuable. For instance, the evidence of a police constable or other witness who might testify that he was keeping watch on a certain place and saw an incident might be challenged on the ground that from the place where he was concealed he could not possibly have seen what he said he had. It might be of the utmost value then to let the jury see the place with the witness in the position to which he had spoken; he might well be able to demonstrate that while a shorter man would not have been able to see the incident or a taller man might have been exposed to view, he could, though concealed, have seen what he said he did. If a witness at the view put himself in a position different from that which he had described in his previous evidence that would naturally expose him both to cross-examination and comment but, as the Court of Criminal Appeal observed, this would go to the weight but not to the admissibility of his evidence. In *Reg.* v. *Martin and Webb*[1] a view was directed and two constables went to it to point out where they stood when observing the acts complained of. The court did not quash the conviction, but would not go into the question of whether questions were asked of the witnesses in the absence of the judge and the prisoners, as there had been no inquiry into this below. Their Lordships are of opinion that witnesses who had already given evidence took part in the view in the sense of placing themselves in the positions in which they said they had been at the material times or indicating the positions of others and that this was unobjectionable. That ground of appeal therefore fails.

It is now necessary to deal with what took place at the view. When giving special leave to appeal their Lordships asked to be supplied with an agreed statement of what took place at the view and one prepared by the respective counsel engaged has been before them. A marshal and constables having been sworn to keep the jury, they were taken in motor-cars to the scene of the shooting, where they were joined by the judge, counsel and court officers. At their destination the jury were checked by the marshal and were also checked at any other place where they stopped during the day. Any juror who wanted to ask a question put it through the judge, and the witness gave a demonstration as the answer, and counsel were invited by the judge to ask questions through him, but no cross-examination was allowed. Owing to the nature of the locality, at some points small boats had to be used to cross or get along trenches and cuts, and at some points it was inevitable that jurors, counsel and witnesses got into the same boat or had to walk together along a dam, but no witnesses were then asked to show anything. It seems that on one occasion a juror and a witness were in the same boat as one of the counsel for some of the accused, who has stated that there was no conversation relating to the case. It is to be specially noticed that the judge was present the whole time so that he could observe and control the proceedings. That a view is part of the evidence is, in their Lordships' opinion, clear. It is in substitution for or supplemental to plans, photographs and the like. In such a view as took place here and the purpose for which it was held there can, in their Lordships' opinion, be no objection to the judge asking a witness to place himself at a particular spot which he has mentioned in his evidence or to show to the jury the place where someone else stood or the

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[1] (1872) L.R. 1 C.C.R. 378; 26 L.T. 778.

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direction from which someone came. There is nothing to show that any more than this took place. The Chief Justice in the Court of Criminal Appeal observed that in the Colony views are far more frequent than in England, for the reasons that have been mentioned above, and the judges of that court, who are doubtless thoroughly accustomed to this procedure, saw nothing wrong in it, nor does this Board. So long as the witnesses taking part are recalled to be cross-examined, if desired, their Lordships are unable to see that the accused person is in any way prejudiced, but they would observe that it is essential that every effort should be made to see that the witnesses make no communication to the jury except to give a demonstration. In *Reg.* v. *Martin and Webb* [1] it is clear from the report that neither the judge nor the prisoner attended the view which was held after the summing-up. The court said there was no irregularity in allowing such a view, though such precautions as may seem to the court necessary ought to be taken to secure that the jury should not improperly receive evidence out of court. Here everything was done in the presence of the judge, who throughout was in control of the proceedings. It was eminently desirable that he should be present, and it is possible that, had he not been, a different result would have followed.

It was, however, strenuously argued before this Board that as the accused was not present this is a fatal objection. A short answer to this point was made by Mr. Le Quesne, for the Crown, who pointed out that under the Criminal Procedure Ordinance it is competent for the court to allow the accused to be absent during a part of the trial. The holding of a view is an incident in and therefore part of the trial, and as the court, on being informed that the accused did not desire to attend, did not insist on his presence, this is equivalent to allowing him to be absent. But, in addition to this, their Lordships desire to say that if an accused person declines to attend a view which the court thinks desirable in the interests of justice he cannot afterwards raise the objection that his absence of itself made the view illegal and a ground for quashing the conviction, if one follows, though he could, of course, object if any evidence were given outside the scope of the view as ordered. The appellant had the opportunity of attending and declined it. Their Lordships would further observe that the absence of the accused was not made a ground of appeal to the Court of Criminal Appeal and does not appear to have been raised at all in that court.

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[1] L.R. 1 C.C.R. 378.

One further ground of appeal was raised before the Board; it was said that there was misdirection by the judge in that he did not point out or, at least, sufficiently stress to the jury that the unsworn statements of the various accused persons were only evidence against the maker of the statement and not against the others. Their Lordships have considered the various passages in the summing-up to which their attention was directed and are satisfied that there is no substance in this objection, and for the same reasons as were given by the Court of Criminal Appeal.

On all grounds therefore this appeal fails.

Solicitors: *Hy. S. L. Polak & Co.; Charles Russell & Co.*

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Jan. 26.

REARDON SMITH LINE LTD. . . . APPELLANTS;

AND

AUSTRALIAN WHEAT BOARD . . . RESPONDENTS.

ON APPEAL FROM THE HIGH COURT OF AUSTRALIA.

Shipping — Charterparty — Safe port — Nomination of unsafe port — Master acting reasonably—Damage to vessel—Charterer liable in damages.
Australia.

The charterer of a vessel is liable in damages to the shipowner, subject to possible questions of remoteness or novus actus interveniens, if, being obliged by the terms of a voyage charterparty to nominate a safe port of loading, he nominates an unsafe port and, the master having acted reasonably, the vessel in consequence of entering the port suffers damage which flows from the breach of the obligation.

A vessel chartered by the respondents from the appellant shipowners was by the terms of the voyage charterparty to proceed "to "one or two safe ports in Western Australia" and there load "at "such safe dock, pier, wharves, and/or anchorage as ordered" by the charterers. At the port nominated a hauling-off buoy, for use in keeping a vessel off the wharf in northerly winds, was missing, and in the centre of a waling-piece or fender on the wharf itself some 50 feet was missing. During a gale the ship rolled and damaged herself and the wharf. The shipowners claimed damages from the charterers for breach of their contractual obligation to nominate a safe port and berth. It was found in the courts below that the port or wharf was unsafe, and that the master had acted reasonably in accepting the nomination:—

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* *Present*: VISCOUNT SIMONDS, LORD OAKSEY, LORD RADCLIFFE, LORD KEITH OF AVONHOLM, and LORD SOMERVELL OF HARROW.

Held, that there were no grounds for disturbing the findings that the port or wharf—it was immaterial, for the purposes of this case, which of them—was unsafe, and that the master had acted reasonably. The port was unsafe at the time of the nomination and when the damage occurred, and the charterers having broken their undertaking to nominate a safe port or wharf were liable for the damages to the vessel which flowed from the breach.

Compania Naviera Maropan S/A v. *Bowaters Lloyd Pulp and Paper Mills Ltd.* [1955] 2 Q.B. 68; [1955] 2 W.L.R. 998; [1955] 2 All E.R. 241, in which the majority decision of the High Court of Australia in the present case (91 C.L.R. 233) was not followed, approved.

Dicta of Devlin J. ([1955] 2 Q.B. 68, at p. 77) as to the position of a master if and when he realizes or suspects danger or the possibility of danger at a nominated port, approved.

Limerick S.S. Co. v. *Stott & Co.* [1921] 1 K.B. 568—a time charter case—approved.

Where, as in *Lensen Shipping Co. Ltd.* v. *Anglo-Soviet Shipping Co. Ltd.* (1935) 40 Com.Cas. 320, a time charter contains an undertaking by the charterer that the vessel is to be employed between good and safe ports, the liability of the charterer is in all ordinary circumstances the same as where under a voyage charterparty the charterer undertakes to nominate a safe port.

Samuel West Ltd. v. *Wright's (Colchester) Ltd.* (1935) 40 Com. Cas 186, *The Pass of Leny* (1936) 155 L.T. 421, and *G. W. Grace & Co. Ltd.* v. *General Steam Navigation Co. Ltd.* [1950] 2 K.B. 383; 66 T.L.R. (Pt. 1) 147; [1950] 1 All E.R. 201 considered.

Judgment of the High Court of Australia (sub nom. *Australian Wheat Board* v. *Reardon Smith Line Ltd.*) (1954) 91 C.L.R. 233; [1954] 2 Lloyd's Rep. 148 reversed.

APPEAL (No. 27 of 1955), by special leave, from a majority judgment of the High Court of Australia (June 2, 1954) reversing a judgment of the Supreme Court of Western Australia (January 30, 1953) in favour of the appellants in an action brought by them against the respondents for damages for the alleged breach of the latter's obligation under a voyage charterparty in ordering the appellant's motor vessel *Houston City* to an unsafe port, Geraldton, in Western Australia, and to an unsafe berth there, to load a cargo of wheat. The vessel was severely damaged in the course of loading as the result of a storm which caused her to range heavily against the concrete side of the berth. A hauling-off buoy, for use when there were northerly winds, and about 50 feet of fender from the wharf were missing.

The relevant provisions of the charterparty, which was dated March 19, 1951, were: "It is this day mutually agreed . . .

"1. That the said vessel, being in every way fitted for the "voyage shall, with all convenient speed, after completion of her "present voyage and discharge of her outward cargo (if any) "proceed, as ordered by the charterers, to one or two safe ports "in Western Australia, or so near thereunto as she may safely "get, and there load according to the custom of the port, always "afloat, at such safe dock, pier, wharves, and/or anchorage, as "ordered, . . . a full and complete cargo of wheat in bulk, ex "silo, which the said charterers bind themselves to provide . . .

"7. If proceeding in ballast, the master shall apply to "charterers . . . for loading port orders by wireless 96 hours "before arrival at the loading area . . . and orders for loading "port shall be given by charterers by wireless within 48 hours "of receipt of master's application."

The Supreme Court of Western Australia (Wolff J.) found for the appellants. On appeal, the High Court of Australia (Webb and Taylor JJ., Dixon C.J. dissenting) found for the respondents.

The case before the Board proceeded on the issue of liability only.

1955. Dec. 1, 5, 6, 7. *A. A. Mocatta Q.C.* and *John Donaldson* for the appellants. There are concurrent findings of the courts below that the berth was unsafe, and the main question is what is the effect in law of the breach of a condition that a ship should go to a safe port or berth as ordered by the charterer. The appellants say that if it is not safe and the shipowner complies with the order, then any damage that he suffers in consequence thereof is recoverable as damages, subject only to the question of remoteness. The respondent charterers say that whilst the shipowner need not send his ship to the named port if it is in fact not safe, that is his only remedy; he goes there at his peril, and he has no claim for damages if his ship is damaged. That is the primary issue in this case, and it is one of great importance because a provision as to safe port and berth appears in all such charterparties.

Various subsidiary arguments are put forward in the respondent's case. They seek to draw a distinction between the English cases decided on a voyage charter and a time charter. It is submitted that there is no distinction in law between the two. They also say that there was no undertaking as regards the safety of the berth; that the berth was only temporarily unsafe, and that the appellants should have waited until that temporary unsafety was cured.

The second major point—related to the first—is, assuming that there is a warranty that the port is safe, nevertheless, does the fact that the master knew that the port was lacking in certain respects have the effect of preventing the appellants from recovering the damages for breach of contract? That, it is submitted, is a question of fact. The respondents alleged that the master's decision to enter the berth with full knowledge of its condition constituted a novus actus interveniens. Whether there has been a break in the chain of causation is in essence a question of fact. The trial judge, and Dixon C.J. in the High Court, held that there had not been any novus actus. The majority judges did not expressly deal with that question, and they found against the appellants principally on the question of law as to what is the meaning of the clause in the charterparty that the charterers should order the ship to a safe port. So there is no support in the judgments for the respondent's contention of fact that the chain of causation was broken by some novus actus.

As regards the principle—as distinct from authorities—it is that if the owner suffers damage he can recover: there is no justification on general principles for saying that the only effect in law of ordering to an unsafe port is that the master need not go there.

There is a somewhat novel feature in the appeal. The Australian judgment turned on the right appreciation of English authority, and there is a choice between two views, one expressed by Branson J. in 1935 and the other by Devlin J. in 1950. In *Samuel West Ltd.* v. *Wright's (Colchester) Ltd.*[1] Branson J. said: "It seems to me that the attempt to put as a matter of "contract the safety of a berth upon the consignee as distin-"guished from the ship is an attempt which has not succeeded "yet in any reported case. . . . It seems to me that the true "position is that the charterparty gives the consignee a right to "order the vessel alongside any particular wharf, but if the "vessel does not know what it is going to find there it can make "inquiry, and if it finds that it cannot safely deliver by going "there, then it is excused from obeying that order; that is all, "in my view, that is intended by those words of the charter-"party." In *G. W. Grace & Co. Ltd.* v. *General Steam Navigation Co. Ltd.*[2] Devlin J. expressed the view that the dictum of Branson J. in *Samuel West Ltd.'s* case[3] was unsatisfactory.

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[1] (1935) 40 Com.Cas. 186, 191–192.

[2] [1950] 2 K.B. 383; 66 T.L.R. (Pt. 1) 147; [1950] 1 All E.R. 201.

[3] 40 Com.Cas. 186.

There is the further novel feature in this case that since the judgment now appealed from was given by the Australian High Court a similar case, *Compania Naviera Maropan S/A* v. *Bowaters Lloyd Pulp and Paper Mills Ltd.* (*The Stork*),[4] has been decided in the English courts. In that case Devlin J. reconsidered the authorities, including the judgments now appealed from, but confirmed the view which he had indicated in *G. W. Grace & Co. Ltd.'s* case [5]—that the nomination of an unsafe port was itself a breach of contract and that the charterer was therefore liable to indemnify the shipowner in respect of all loss directly and naturally caused by such breach. The Court of Appeal unanimously affirmed the decision of Devlin J.[6]; all the Lords Justices expressly approved the dissenting judgment of Dixon C.J. in the present case. The view of the law taken by the Court of Appeal in that case is correct.

Before Branson J.'s judgment in *Samuel West Ltd.'s* case [7] there had been four cases relevant to this matter, three of which were on voyage charters and one a time charter. In the first, *Ogden* v. *Graham*,[8] the ship was ordered to an unsafe port of discharge. The owners, who refused to go there, were awarded damages by way of detention. The principle is indistinguishable. In *Hall Brothers Steamship Co. Ltd.* v. *R. & W. Paul Ltd.*[9] the owners recovered costs incurred in lightening the vessel before she could reach the dock in the port to which she was ordered. *Limerick Steamship Co.* v. *Stott & Co.*[10] was a time charterparty case, and Bailhache J. said: "In my judgment the expense of "cutting the masts [to enable the vessel to proceed down the "Manchester Ship Canal] must fall on the charterers, because "they were only entitled to order the *Innisboffin* to a safe port, "which means a port to which a ship can safely get and from "which she can safely return. It was therefore a breach of con-"tract for the charterers to order her to proceed to Manchester, "and having committed a breach of contract they must pay the "damages which flow from that breach of contract." In that passage the judge places no reliance on any clause peculiar to a time charter; and it is submitted that that case is an authority directly in point. That case went to the Court of Appeal,[11] but the only point argued was on the ice clause, but see *per* Scrutton

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[4] [1955] 2 Q.B. 68; [1955] 2 All E.R. 241.

[5] [1950] 2 K.B. 383.

[6] [1955] 2 Q.B. 93, 98, 106.

[7] 40 Com.Cas. 186.

[8] (1861) 1 B. & S. 773.

[9] (1914) 30 T.L.R. 598; 19 Com. Cas. 384.

[10] [1921] 1 K.B. 568, 575.

[11] [1921] 2 K.B. 613, 621; 37 T.L.R. 674.

L.J.: "The question was argued before us whether the charterers "who requested the ship to go to an unsafe or an ice-bound port, "to which she was not bound to go, were liable if she went "for damage sustained on her voyage. I desire to reserve my "opinion on this point. The state of knowledge of shipowner and "charterer may be material when the point has to be decided." The fourth case was *Axel Brostrom & Son* v. *Louis Dreyfus & Co.*,[12] a decision of Roche J. in which it was held that Londonderry was not a safe port for the vessel in question because of the narrowness of the winding channel forming the access to a port where no tugs were available.

Then came *Samuel West Ltd.'s* case,[13] and it is submitted that there had been no case previously which gave any support for the view there expressed by Branson J. It is not a very satisfactory case in any event, because in a sense it is obiter, because the judge said that he was not satisfied that it was proved at all that the consignees ordered the ship to the berth. Further, it can be distinguished on the basis that he was construing different words. In *Lensen Shipping Co. Ltd.* v. *Anglo-Soviet Shipping Co. Ltd.*[14] it was said: "In my view, the stipulation "in clause 1 in this case, implying the right of the owners to "direct the ship to good and safe ports as there defined, as a "matter of business requires an implication that the port or place "should include good and safe berths therein." The *Pass of Leny*[15] would appear to be against the appellant's contention, for it was there said that no warranty of fitness of the berth was expressly or impliedly given. But, as is said in Scrutton on Charterparties, 15th ed., p. 122, (*n*): "The authorities on the "topic of the nomination of unsafe ports or berths are not entirely "satisfactory." The last authority before *The Stork*[16] was *G. W. Grace & Co.'s* case[17] before Devlin J. which, it is submitted, brought some clarity into the law on this matter.

The law is as stated in *The Stork*,[18] following Devlin J. in the *Grace* case.[19] Those two decisions have settled the confusion in the authorities. It is summarized in the most recent edition of Scrutton on Charterparties, 16th ed., p. 128, which is adopted as summarizing my argument.

With regard to the subsidiary matters; there is nothing in the suggested distinction for present purposes between a time charter and a voyage charter. As to the temporary unsafety allegation by the respondents, that is a question of fact and the courts have held that the berth was unsafe.

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[12] (1932) 38 Com.Cas. 79.
[13] 40 Com.Cas. 186.
[14] (1935) 40 Com.Cas. 320, 331.
[15] (1936) 54 Ll.L.Rep. 288, 294.
[16] [1955] 2 Q.B. 68.
[17] [1950] 2 K.B. 383.
[18] [1955] 2 Q.B. 68.
[19] [1950] 2 K.B. 383.

Sir Garfield Barwick Q.C. (Australia) and *Michael Kerr* for the respondents. Dealing first with the matter on broad principles, because it would appear that the point has not arisen decisively except in the cases of *G. W. Grace & Co. Ltd.* v. *General Steam Navigation Co. Ltd.*[19] and *Compania Naviera Maropan S/A* v. *Bowaters Lloyd Pulp and Paper Mills Ltd.*,[20] the result of the latter being to some extent built on the case now under appeal, the submissions are: (1) That there is no promise that the nominated port or berth will be safe for the particular ship during its passage to and departure from the nominated port or berth. (2) It is conceded that there is an implied obligation on the charterer to exercise the right of nomination which the charterparty gives him. (3) There was no breach either of the promise, if there were one, or of that obligation which is conceded. (4) The consequence of taking the ship to a berth known to the owner through the master to be temporarily unsafe did not arise naturally out of a breach either of the promise, if any, or of the conceded obligation. (5) The precise question in the case so far as it touches the main point of law is this: does a charterer who has the right under a voyage charter to nominate a safe port or berth guarantee to the shipowner that the nominated port or berth shall be safe for the particular ship during its passage to, presence in and departure from that port of berth?

It is said against the respondents that they undertook that the berth would be safe. The words "would be safe" are capable of being ambiguous in a certain sense. The time at which to test the port or berth safety is at the date of the nomination. That obligation must be derived in this case by implication from the terms and circumstances of the charterparty. At the time of the nomination of Geraldton the master could not have refused the order, and therefore the giving of the order could be no breach. It appeared from the evidence that it was anticipated at the date of the berthing that the buoy would be replaced in a matter of days, and in fact it was replaced on July 13, 1951. No case could be made that the anticipated delay, viewing the matter from July 3 (the date of the order directing the ship to proceed to Geraldton), was inordinate. Further, there is no evidence that the charterers in fact knew of the absence of the buoy or of the waling-piece. They could, therefore, have had no reason on

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[19] [1950] 2 K.B. 383.

[20] [1955] 2 Q.B. 68.

July 3 to think the buoy absent, and that is the material date.

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This is a case where (1) the charterers did not necessarily have the dimensions of the ship; (2) the defect which is said to make a port otherwise safe temporarily unsafe was expected to be remedied in such a time as would not involve inordinate delay in the adventure in hand; and (3) the cost of awaiting the berth was for the charterers' account. I must accept that at the moment of arrival the berth was unsafe.

On the point of principle; the question is whether the necessary promise, warranty or guarantee, whatever it may be called, can be implied in this charterparty. It is a question of implying a term, for there is no express promise on the part of the charterers. The limit of the implication is that there is an implied undertaking on the part of the charterers that they will in due time exercise their right of nomination. What is alleged against them is a sort of negative promise: "the charterers shall "not order." It is submitted that the promise is positive, and is to exercise their right so as to enable the shipowners to earn their freight. The time to test whether there is a good or bad nomination is the date when it is given, viewing the probabilities and contingencies from that date. Supposing a nomination then to be good, and it subsequently for some reason becomes bad, there is then no obligation to go to the berth. It would be unreasonable to think that the charterer in these modern days of swift communication knows more about the condition of the berth than those in charge of the ship. If it is a bad nomination it can be refused. The express obligation on the shipowner is a qualified obligation and limited by the words "so near thereto "as he may safely get"—those words excuse him. That was contemplated in *Ogden* v. *Graham*.[21]

If the charterers were not in breach at the date they gave the nomination, then, of course, there is no outstanding obligation which is unperformed. The appellants would impose on the charterers a continuing knowledge of things which they knew nothing about. This case is a sort of open territory at the moment. It should not be decided on the unusual circumstances which were found in *The Stork*.[22] And Branson J. in *Samuel West Ltd.'s* case [23] said that the charterer does not know enough about the vessel to determine whether the berth is safe. The charterer's first nomination is not necessarily final: *The Stork* [24];

[21] 1 B. & S. 773, 781.

[22] [1955] 2 Q.B. 68.

[23] 40 Com.Cas. 186.

[24] [1955] 2 Q.B. 68, 75.

the shipowner on receiving a nomination could reject it if through the master he considered it unsafe, and there would be room for a re-nomination. Here the master knew of the risks of the port; he went in gambling on the weather not changing, and it is found against the charterers that it was reasonable for him to take the ship in. There is no reality so far as the respondents are concerned. [Reference was made to *Tharsis Sulphur and Copper Co. Ltd.* v. *Morel Brothers & Co.*,[25] *Akticselskabet Olivebank* v. *Danck Svovlsyre Fabrik*,[26] *Ogden* v. *Graham*[27] and *Johnston* v. *The Saxon Queen*.[28]] Devlin J. in *The Stork*[29] said that one can get to this warranty by comparing the contract with a contract for the sale of goods. It is submitted that there is no similarity or analogy.

Summarizing; it is submitted that the nomination of a port which at the date of nomination is unsafe in fact for the vessel concerned having regard to the potentialities of the port is a breach of the obligation to nominate a port within the contractual limits. That is an implied obligation and represents the full extent of any permissible implication. There is no promise, express or implied, that the nominated port will be or will continue to be safe for the particular vessel. Nor is such a nomination an invitation to the owner to proceed there. Upon receipt of a nomination the shipowner may take these precautions: (a) He may reject the nomination. (b) In cases where the port may be rendered safe for the particular vessel by some reasonable and available expedient, the owner may accept it and recover the cost of the expedients. (c) He may accept the nomination and thereby attract to it the limitations and privileges of the charterparty, and that includes that he can go as near thereto as he can safely get. He cannot accept it and thereafter seek to charge the charterer with the consequences of the unsafety of the port except in so far as the other terms of the charterparty permit him to do so.

With regard to the authorities, before the decision in *The Stork*[30] no case had been decided that the charterer under a voyage charter warranted the safety of the nominated port. It had been decided that the nomination of an unsafe berth was a breach of the obligation to nominate. Claims for indemnity under indemnity clauses in time charters had been allowed to include damages resulting from the employment of the ship to or from an unsafe port: the *Lensen Shipping Co.'s* case.[31] There is a valid distinction between a time charter and a voyage charter; the latter is to be looked at on a quite different basis. [Reference was also made to *Hall Brothers Steamship Co. Ltd.* v. *R. & W. Paul Ltd.*,[32] *Axel Brostrom & Son* v. *Louis Dreyfus & Co.*[33] and *Limerick Steamship Co.* v. *Stott & Co.*[34]] No case or dictum lends colour to the view that the warranty is carried throughout in a case where, for example, the port was safe but before the vessel leaves a light beacon is carried away and the master attempts to leave without it. Transient factors rendering the berth temporarily physically unsafe do not make the berth relevantly unsafe unless the delay in awaiting their removal would be incommensurate delay: *Metcalfe* v. *Britannia Ironworks Co.*[35]; *S.S. Knutsford* v. *Tillmans.*[36] The only finding of unsafety here is the joint absence of the buoy and the waling-piece.

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[25] [1891] 2 Q.B. 647; 7 T.L.R. 704.

[26] [1919] 1 K.B. 388; [1919] 2 K.B. 162; 35 T.L.R. 156, 373.

[27] 1 B. & S. 773.

[28] (1913) 108 L.T. 564.

[29] [1955] 2 Q.B. 68, 76.

[30] [1955] 2 Q.B. 68.

Lastly, on the question of damages, and assuming all else against the respondents—the warranty, and that there was a breach of it—the damage to the ship, it is submitted, does not arise naturally out of the breach. The ship remained in the berth the master knowing of the danger. As Devlin J. said in *The Stork*,[37] "there may be cases in which the charterer is innocent "of any intention to break a contract and where the master "deliberately decides to enter a port which he knows to be "unsafe." It cannot be said that it would be unreasonable to go into the port and quite reasonable to stay in the berth with complete knowledge of the risk. It is equally reasonable to remain there as it would be to go in. One cannot reasonably infer that the master acted reasonably when one combines these circumstances.

Mocatta Q.C. in reply. On the true analysis the meaning of clause 1 of this charter as to a port of nomination and as to ordering to a safe berth is one of interpretation and construction in the light of the contract as a whole, and it is wrong to say that the owner's case depends upon an implied term. No such implied term is pleaded here. The words "as near thereto," etc., do not assist the respondent's case in saying that the charterer's obligation as to a safe berth is in some way limited.

Next, the respondents conceded that there was an implied obligation on the charterers to nominate a port which, as they

[31] 40 Com.Cas. 320.
[32] 19 Com.Cas. 384.
[33] 38 Com.Cas. 79.
[34] [1921] 1 K.B. 568.
[35] (1877) 2 Q.B.D. 423.
[36] [1908] A.C. 406.
[37] [1955] 2 Q.B. 68.

put it, would, having regard to the potentialities, be safe at the date when it was expected that the ship would get there; and they accepted a similar obligation as regards a berth. The charterers would have no difficulty in finding out the draught and size of the ship, and they must know the peculiarities of the port and berth before they can properly fulfil their admitted obligation. So there is nothing in the point that it would be difficult for the charterers to find out these things.

Wolff J. in his judgment in the Supreme Court said that the editor of the ninth edition of Carver on Carriage of Goods by Sea drew attention at p. 691 to the statement in section 460 of the previous editions that " where the charterer designates the berth " he is bound to take reasonable precautions to ascertain that it " is safe, and, if necessary, warn the master." Wolff J. said that he thought that that statement was good law and applicable here. That passage in Carver would appear to be dealing with the breaking of the chain of causation, and not with the extent of the original obligation. As a matter of construction the obligation rests on the charterer in relation to the safety of the port and berth that both shall be safe on the arrival of the ship, during her sojourn and on her departure from the port. The analogy with the sale of goods is sound, and there is no valid distinction to be made. The *Hall Brothers* case,[38] the *Axel Brostrom* case [39] and the *Limerick* case [40] are in fact against the whole tenor of the argument for the respondents.

1956. January 26. The judgment of their Lordships was delivered by LORD SOMERVELL OF HARROW, who stated the nature of the claim and the relevant terms of the charterparty and continued: The question whether the port or wharf was unsafe within the meaning of the clause is logically the first issue. All judges below decided that it was. The main issue then argued was one of construction as to the liability, if any, of the charterer for damage to the ship which flowed from the non-safety of the port or wharf. There was a further issue as to whether, assuming the charterer's liability for damage, the damage on the facts of this case flowed from the breach.

After summarizing the facts it will be convenient to deal first with the issue of construction. On July 3, 1951, in accordance with clause 7, the master sent a radio message to the respondent's office at Perth for orders. The relevant words in

[38] 19 Com.Cas. 384.

[39] 38 Com.Cas. 79.

[40] [1921] 1 K.B. 568.

the reply were: "Loading Port Geraldton full and complete "cargo wheat in bulk." The master had loaded grain at Geraldton on two previous occasions. There was only one berth suitable for loading grain and it is immaterial in this case whether one treats the allegation as coming under the words "safe port" or "safe wharves." In the judgments below reference is made to the safety of the berth. In considering the principle it seems right to use one or other of the words contained in the relevant clause, either of which in the present case would apply. The vessel arrived on July 7 and was met by the pilot and harbour master, Captain Sweett. After a short wait for another vessel to get out of the way, the *Houston City* berthed shortly after 5 p.m. The weather was fine.

The berth is exposed to northerly winds, but the evidence did not establish that it was ordinarily unsafe for a vessel such as the *Houston City*. Two defects are relied on. One of two hauling-off buoys was missing and had been missing since the previous May. The master noticed the absence of the buoy and Captain Sweett informed him that its return was imminent. Further, in the centre of a waling-piece or fender some 50 feet was missing and had been missing for some months. There was no suggestion as to when it was likely to be replaced. Both the buoy and the waling-piece were to obviate the danger to a vessel at the berth from northerly winds.

There was a suggestion below that the master should have laid out an additional anchor. This was rejected by all the judges and was not pursued before the Board.

July 7 was a Saturday. Loading began on the 9th and continued till the 12th. About 11.45 a.m. on that day the wind freshened from the north and soon increased to gale force. The ship rolled and damaged herself and the wharf. The judge found that the absence of the buoy and of the waling-piece contributed to the damage.

The vessel with the necessary parts and equipment to repair the buoy arrived on the 12th and repairs began. The buoy was restored on the 13th.

Proceeding on the basis that the port or wharf was unsafe the appellants' case on construction is simple. They submit that under clause 1 the charterer has undertaken to nominate a safe port or wharf for the loading. In breach of this provision the port or wharf nominated was unsafe and if damage to the ship flowed from that breach as a natural and probable consequence the charterer is liable for it.

The respondents did not, of course, suggest that the owner could be compelled to load at an unsafe port, but contend that if the charterer nominated an unsafe port, the owners could reject the nomination, as soon, presumably, as they had discovered that the port was unsafe. They might be entitled to damages for delay caused by the nomination. If, however, they accepted the nomination and went to the port the charterer would, it is said, in no circumstances be liable for damage flowing from the want of safety, unless liability arose under some other provision in the contract.

The two rival contentions can be illustrated by two citations, one from the majority judgment and the other from a judgment of Bailhache J. in *Limerick Steamship Co.* v. *Stott & Co.*[1] cited by Sir Owen Dixon C.J. "Clause 1 of the charterparty appears "to us," that is to the majority of the High Court,[2] "to be "designed to define the obligations of the shipowner with respect "to loading ports and to prescribe, consequentially, a limitation "on the charterer's *rights* to designate such ports, though, no "doubt, under that clause and clauses 6 and 7 the appellant was "bound to give appropriate loading orders and provide the stipulated cargo. There is, of course, ample authority for the "proposition that a failure or refusal, pursuant to such a provision, to designate a safe port will sound in damages and the "nomination of an unsafe port may well be involved in such a "failure or refusal. But it by no means follows that where the "nomination of an unsafe port is involved in such a failure or "refusal the shipowner may recover not only the damages which "flow from the failure or refusal but also the damages sustained "by the vessel after proceeding to the designated port and as "the result of its unsafe nature or condition. Such damages do "not flow from a refusal to nominate a safe port."

In *Limerick Steamship Co.* v. *Stott & Co.*[3] the main issue related to ice at Abo. There was a second point. The ship had been ordered to Manchester. After discharge she was unable to get down the canal without cutting her masts. Bailhache J. said[3]: "In my judgment the expense of cutting the masts "must fall upon the charterers, because they were only entitled "to order the *Innisboffin* to a safe port, which means a port to "which a ship can safely get and from which she can safely "return. It was therefore a breach of contract for the charterers

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[1] [1921] 1 K.B. 568.
[2] (1954) 91 C.L.R. 259.
[3] [1921] 1 K.B. 568, 575.

" to order her to proceed to Manchester, and having committed " a breach of contract they must pay the damages which flow " from that breach of contract."

Their Lordships are unable to construe the clause in the way suggested in the passage cited from the majority judgment. That construction in effect makes the nomination of an unsafe port equivalent in its legal consequences to a failure to nominate a port at all. This would seem to disregard the words and the realities of the relationship. The words of the clause, in their Lordships' opinion, are an undertaking by the charterers to nominate a safe port and a safe dock, etc., within that port. The charterer is given a choice, within limits prescribed, as to where he will have his cargo available for loading. It seems natural that he should give at any rate some undertaking as to its safety, and that the owners should be entitled to rely on the place nominated being safe. If he breaks this undertaking and nominates an unsafe port and the ship is damaged through going there he will be liable for the damage, subject of course to possible questions of remoteness, or novus actus interveniens. This was the construction assumed by Bailhache J. in the passage cited. If there is any doubt in the charterer's mind as to the draught or dimensions of the ship as affecting its power to load safely at a particular port or berth there is obviously no difficulty in his getting any information he wants from the owners.

The authorities support the construction submitted by the appellant.

In *Ogden* v. *Graham* [4] the vessel was ordered by the charterer under a voyage charterparty to discharge at a port held to be unsafe. The owners refused to go to the port and claimed damages for detention. The lack of safety arose from the fact that the district was in a state of rebellion and any ship going to the port would have been confiscated. The defendant argued that safe referred only to incidents of navigation. This argument was rejected. Wightman J. said,[5] " the charterers must pay the " damage occasioned by the breach of contract in not naming a " safe port, to which they have made themselves liable by the " specific terms of the contract." Blackburn J., having held that the port was unsafe, said [6]: " That being so, they are liable for " damages for not naming a safe port within a reasonable time, " and the measure of damage will be regulated by the detention " of the ship at Valparaiso beyond that time."

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[4] (1861) 1 B. & S. 773.

[5] Ibid. 780.

[6] Ibid. 782.

In *Hall Brothers Steamship Co. Ltd.* v. *R. & W. Paul Ltd.*[7] the vessel, under a voyage charterparty, was ordered to King's Lynn. The vessel could not reach the dock without lightening. Sankey J. held that as a result King's Lynn was not a safe port. It had been argued, inter alia, that as the master had accepted the order to proceed to King's Lynn no damages could be recovered. This argument was rejected and the plaintiffs recovered the costs incurred in lightening the vessel.

Limerick Steamship Co. v. *Stott & Co.*[8] has already been referred to. The charter in that case was a time charter under which the vessel was to be employed between good and safe ports or places within the limits of one Baltic round. It also contained a clause, usual in time charters, that the master shall be under the orders of the charterer, who shall indemnify the owner for the consequences of complying with such orders. The majority in the High Court distinguished that case by reason of the presence of that latter clause. It is clear that that was not the ratio of the judge. He relied, and relied only, on the provision that the vessel could only be ordered to a safe port.

In *Axel Brostrom & Son* v. *Louis Dreyfus & Co.*[9] a question of law as to the meaning of a safe port came before Roche J. on an award in the form of a special case. Under a voyage charter the charterer had ordered the vessel to Londonderry. Owing to her length she required tug assistance to negotiate the bends of the River Foyle. There were no tugs at Londonderry and one had to be obtained from Glasgow. The charterer argued, unsuccessfully, that the port was a safe port, but neither before the arbitrator nor before the judge was it suggested that the charterer was not responsible for the cost of obtaining the tug if he had ordered the vessel to an unsafe port.

In *Samuel West Ltd.* v. *Wright's (Colchester) Ltd.*[10] Branson J. made some observations which are cited and relied on by the majority of the High Court. A study of the facts makes it clear that the observations were not necessary to the decision. The owners of a motor barge claimed damages from the defendant as consignee on the ground that their vessel had been injured at a wharf to which she had been ordered by the defendant. There was no evidence that the defendant had ordered her there. The words to be construed were different, and the judge apparently construed them as leaving open the question which party had to decide on safety. He added words to the effect that in his opinion it was the owners or their master. He referred to the fact that the draught and structure of the ship would be within the knowledge of the master.

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[7] (1914) 30 T.L.R. 598; 19 Com. Cas. 384.

[8] [1921] 1 K.B. 568.

[9] (1932) 38 Com.Cas. 79.

[10] (1935) 40 Com.Cas. 186.

In *The Pass of Leny*[11] the port, Boston, was named in the charterparty. The damage was done at the berth, and the owners of the vessel sued the owners and managers of the wharf as first defendants and the charterers as second defendants. The charterparty provided that the loading place or dock should be "indicated" by the charterers. These words were construed by Bucknill J. as not amounting to an express promise of safety, and he refused to imply such an obligation. In their Lordships' opinion neither of these cases lends any effective support to the respondent's construction.

In *Lensen Shipping Co. Ltd.* v. *Anglo-Soviet Shipping Co. Ltd.*[12] questions of law came before the court on a special case. The charter was a time charter. The berth was unsafe and the ship had been delayed and damaged. Facts and issues had become involved. In the Court of Appeal Greer L.J., at the end of his judgment, used words which suggest that the claim for ordering to a port which was not safe succeeded under the employment and indemnity clause, which is not, of course, ordinarily found in a voyage charter. There are other passages in his judgment which suggest that he was treating this as an alternative to the case made under the "safe ports" clause. Where a time charter contains, as it did in *Lensen's* case,[12] an undertaking by the charterer that the vessel is to be employed between good and safe ports, the liability of the charterer is at any rate in all ordinary circumstances the same as where under a voyage charterparty the charterer undertakes to nominate a safe port.

In *G. W. Grace & Co. Ltd.* v. *General Steam Navigation Co. Ltd.*[13] Devlin J. reviewed the authorities. He disagreed with Branson J.'s dictum and doubted the existence of the distinction suggested by Greer L.J. between time charters and voyage charters in "safe port" cases. The case arose out of a time charter.

After the hearing of the present case in the High Court the issue under consideration came before Devlin J. and the Court of Appeal (*Compania Naviera Maropan S/A* v. *Bowaters Lloyd*

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[11] (1936) 155 L.T. 421.

[12] (1935) 40 Com.Cas. 320; 52 Ll.L.Rep. 141.

[13] [1950] 2 K.B. 383; 66 T.L.R. (Pt. 1) 147; [1950] 1 All E.R. 201.

Pulp and Paper Mills Ltd.[14]). It was held that under the charterparty the charterer was under an obligation to nominate a safe loading place for the ship chartered. The loading place being unsafe and the master having acted reasonably, the charterer was held liable for damage to the ship. Substantially the same argument was put forward as in the present appeal and rejected.

The decision of the High Court in the present case was cited and the court felt unable to adopt the majority decision and approved the Chief Justice's dissenting judgment.

It was argued, as here, that it was for the master to decide, and that if he accepted the nomination the charterer was under no liability for damage arising out of the absence of safety. On the general and difficult question as to the position of the master if and when he realizes or suspects danger or the possibility of danger, their Lordships would adopt the following passage from the judgment of Devlin J.[15]: "I think, therefore, that the real "question is not so much whether a distinction can be drawn "between a voyage and a time charter, as whether any charter-"party, whether for voyage or for time, is exempt from the "application of the ordinary law of contract. I see no reason in "principle why it should be, and I do not think that business "convenience requires it. Indeed, I think business, whether "maritime or otherwise, might be gravely impeded if the ordinary "principle were not allowed to operate freely—and by the ordin-"ary principle I mean that, generally speaking, a man is entitled "to act in the faith that the other party to a contract is carrying "out his part of it properly. It does not lie in the mouth of "the promisor to say that a promisee has no right to assume that "a promise has been faithfully carried out and should make his "own inquiries to see whether it is or not. If everything done "under contract has to be scrutinized and tested by the other "party before he can safely act upon it, many transactions might "be seriously held up—in doubtful cases, perhaps indefinitely. "Even if the breach is clear, it is vital to the proper conduct of "business that the promisee should be able, if he considers the "breach a minor one, to proceed without sacrificing his right to "be indemnified. That is just as important in a voyage charter-"party as in any other sort of business. Suppose that the master "thinks that the nominated berth is barely large enough and that "he might scrape his vessel's sides and damage her paintwork.

[14] [1955] 2 Q.B. 68; [1955] 2 All E.R. 241.

[15] [1955] 2 Q.B. 77.

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"If (as is the case here) it is the only berth that can be nomi-"nated, is he to throw up the voyage? I am not asked to "assess the damages in this case, so I do not know what was the "cost of repairing the *Stork*. But it is certain that if the ship "had sailed away from Tommy's Arm without carrying her "freight, the cost of the time lost would have been considerable. "It is possible even in this case that a prudent master, without "knowing for certain whether he was right or not and so acting "in the interests of all concerned, might have felt that the risk "of damage to the vessel's bottom was outweighed by the "certainty of time lost. A master under a voyage charterparty is "often confronted with this sort of problem, as, for example, "when he has to decide whether to accept or reject cargo that "may be dangerous, and there are, of course, many cases in "which the ship has recovered for damage done to her by "dangerous cargo.

"To deny the defendants' proposition does not mean that a "master can enter ports that are obviously unsafe and then "charge the charterers with damage done. The damages for any "breach of warranty are always limited to the natural and "probable consequences. The point then becomes one of remote-"ness of damage; or if it is thought better to put it in Latin, the "expressions novus actus interveniens and volenti non fit injuria "are ready to hand. There is also the rule that an aggrieved "party must act reasonably and try to minimize his damage. "A master who entered a berth which he knew to be unsafe "(and which perhaps the charterer had nominated in ignorance "of its condition) rather than ask for another nomination and "seek compensation for any time lost by damages for detention, "might find himself in trouble. So might a master who sought "compensation for the time lost in sailing back across the "Atlantic because he had not cared to risk damage to his paint-"work."

On the question of construction both in principle and on authority their Lordships are of opinion that the appellants succeed.

Certain subsidiary submissions were made by the respondents. It was argued that the danger was likely to be of such short duration that the Board should reverse the finding that the port was not safe. This was put forward on the assumption that if the buoy, the repair of which was expected at any time, had been in order, the absence of the waling-piece would not have rendered the berth unsafe. There is no finding to this effect, nor does the point appear to have been raised. It would seem that the trial judge took the opposite view. The master seems to have thought the waling-piece would not have mattered if the buoy was back, but a marine surveyor called by the appellants said that the wharf would not be safe with a substantial part of an upper waling-piece missing. In any event there was no certainty as to when the buoy would be repaired. This submission fails.

In the present case the port was unsafe at the time of the nomination and remained unsafe until the damage occurred. There was discussion in the argument as to the position if, at the time of nomination, the port would so far as could be foreseen be safe for the vessel when loading but became unsafe later through circumstances unforeseeable by the charterer. The point does not arise here and it is unnecessary to decide it. It would be a question of construction.

There are no grounds in their Lordships' opinion for disturbing the findings that the port or wharf was unsafe or the further finding that the master acted reasonably and the damage therefore flowed from the breach.

Their Lordships will therefore humbly advise Her Majesty that the appeal be allowed and the order of Wolff J. restored. The respondents will pay the costs in the High Court and of this appeal.

Solicitors: *Holman, Fenwick & Willan; Coward, Chance & Co.*

J. C.*
1956
Feb. 15.

COMMISSIONER OF STAMP DUTIES . . Appellant;

AND

NEW ZEALAND INSURANCE COMPANY LIMITED . . . . Respondent.

ON APPEAL FROM THE COURT OF APPEAL OF NEW ZEALAND.

New Zealand—Revenue—Estate duty—Allowance for debts—Liability of estate for future payments of an annuity—Debt—Capable of estimation by actuarial calculation—Allowable deduction—Death Duties Act, No. 21 *of* 1921 (*New Zealand*), *s.* 9 (1), (2) (*d*).
Revenue—Estate duty.

By section 9 of the Death Duties Act, 1921, of New Zealand: "(1) In computing the final balance of the estate of the deceased,

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* *Present*: Viscount Simonds, Lord Oaksey, Lord Radcliffe, Lord Keith of Avonholm, Lord Somervell of Harrow.

"allowance shall, save so far as otherwise provided by this Act, "be made for all debts owing by the deceased at his death. (2) No "such allowance shall be made . . . (*d*) For contingent debts "or any other debts the amount of which is, in the opinion of "the commissioner, incapable of estimation."

The deceased, who died in 1946, had been a party to a deed in 1941 under which he and three others had undertaken for fully adequate consideration to pay an annuity to one R. by way of fixed monthly sums in New Zealand currency during her lifetime. On the death of the deceased, his administrator, the respondent, claimed that in computing the final balance of his estate for the purposes of estate duty there ought to be deducted a sum representing the value calculated actuarially of the liability of the estate to continue paying the deceased's share of the annuity. The appellant, the Commissioner of Stamp Duties, refused to make any allowance in respect of that claim, being of the opinion that it was incapable of estimation and was excluded by section 9 (2) (*d*) of the Act:—

Held, that, having regard to the interpretation of "debt" in section 2 of the Act of 1921 as including "any pecuniary liability, "charge or encumbrance," the annuity was a "debt owing by the "deceased at his death" within subsection (1) of section 9, and was accordingly to be allowed under that subsection "save so far "as otherwise provided by this Act." The meaning of subsection (2) (*d*) was that the only debts within the meaning of subsection (1) which were disallowed were those the amount of which was in the commissioner's opinion incapable of estimation; and on that basis it did not matter whether the annuity was to be thought of as a contingent debt or not. Having regard to the known practice of the valuation of life annuities on actuarial principles for many purposes, the commissioner was wrong in holding that the liability of the deceased under the deed as from his death was incapable of estimation. The respondent was accordingly entitled to the deduction claimed.

Commissioner of Stamp Duties (N.S.W.) v. *Permanent Trustee Co. of New South Wales Ltd.* (*Hill's* case) (1933) 49 C.L.R. 293 considered.

Judgment of the Court of Appeal of New Zealand [1954] N.Z.L.R. 239 affirmed.

APPEAL (No. 8 of 1955), by special leave, from a judgment of the Court of Appeal of New Zealand (December 18, 1953) which reversed a judgment of the Supreme Court of New Zealand (December 17, 1952).

The action out of which this appeal arose was brought as a case stated under section 62 of the Death Duties Act, 1921, of New Zealand to contest an assessment of estate duty made by the appellant, the Commissioner of Stamp Duties, in the estate of Francis Joseph Rolleston, hereinafter called "the deceased."

The following facts and statutory provisions are taken from the judgment of the Judicial Committee: The question in this appeal was whether the appellant, the Commissioner of Stamp Duties in New Zealand, ought to make an allowance in respect of the obligation to pay a life annuity when computing the final balance of the estate of a deceased person for the purposes of estate duty under the Death Duties Act, 1921, of New Zealand. Section 9 of that Act ran as follows: "9. Allowance to be made "for debts.—(1) In computing the final balance of the estate of "the deceased, allowance shall, save so far as otherwise provided "by this Act, be made for all debts owing by the deceased at "his death. (2) No such allowance shall be made—(*a*) For debts "incurred by the deceased otherwise than for full consideration "in money or money's worth wholly for his own use and benefit; "or (*b*) For debts in respect whereof there is a right of "reimbursement from any other estate or person, except to "the extent to which reimbursement cannot be obtained; or "(*c*) More than once for the same debt charged upon different "portions of the estate; or (*d*) For contingent debts or any other "debts the amount of which is, in the opinion of the commissioner, incapable of estimation. (3) If any debt for which by "reason of the provisions of paragraph (*d*) of this section an "allowance has not been made becomes at any time within "three years after the death of the deceased actually payable "or, in the opinion of the commissioner, capable of estimation, "an allowance shall be made therefor, and a refund of any "estate or other duty paid in excess under this Act shall be "made to the person entitled thereto, but no action for the "recovery of any such refund shall be commenced except within "three years after the payment of the duty so paid in excess."

The material facts of the case were very simple. The deceased person was a Mr. Francis Joseph Rolleston, who died on September 8, 1946. Some years before his death, in 1941, he had been one of the parties to a deed, apparently a sort of family arrangement, under which he and other persons had undertaken to remit to a Miss Helen Mary Rolleston a monthly sum of £31 5s. New Zealand currency during her lifetime. In return Miss Rolleston released to the grantors of that annuity a legacy and a share of residue to which she was entitled under the will of another member of the Rolleston family. It was common ground between the parties to the appeal that what Miss Rolleston received was fully adequate consideration for what she gave up under the deed and that accordingly no gift duty was payable in respect of her disposition.

Miss Rolleston was alive at the date of the death of the deceased. He was at that date liable for his share of the accruing monthly instalment of the annuity, which share amounted to the figure of £1 16s. 5d. That amount was admitted by the appellant as a deduction under section 9 (1).

The respondent claimed that a further deduction of £1,052 9s. ought to be made, as representing the estimated amount of the sum owing in respect of the annuity at the date of the deceased's death. The case stated by the appellant, which was the origin of the present proceedings, did not contain any information as to how the figure of £1,052 9s. was arrived at, but it seemed to have been assumed throughout that it was the figure of the actuarial value of the share of Miss Rolleston's annuity payable by the deceased at the same date. The appellant rejected that claim, but conceded that under section 9 (3) the sum of £281 5s. ought to be deducted, that amount being the sum of the deceased's share of the monthly payments of £31 5s. which had become actually payable since the date of his death.

The question thus raised had occasioned a difference of opinion in the courts of New Zealand. In the Supreme Court Northcroft J. upheld the appellant's rejection of the deduction claimed. The basis of his decision was that the liability under the annuity was a contingent debt within the meaning of subsection (2) (*d*); and that, since the period of the annuitant's life was not capable of determination in advance, an estimate of the quantum of the contingent indebtedness or pecuniary liability could not be made. That treatment of the matter seemed to assume that as a matter of construction the relative clause in subsection (2) (*d*) " the amount of which is in the opinion of the " commissioner incapable of estimation " qualified both of the preceding phrases " contingent debts " and " any other debts." The judge found considerable support for the view that he had taken in the judgments of the High Court of Australia in *Commissioner of Stamp Duties (N.S.W.)* v. *Permanent Trustee Co. of New South Wales Ltd.**

In the Court of Appeal the decision of the Supreme Court was reversed, and it was held that the deduction of £1,052 9s. ought to be allowed. All three judges in that court (Fair, Stanton and Hay JJ.) adopted the same line of reasoning. In their view there was a material distinction between a liability which could be described as " a debt that may never become due," such as, for instance, a guarantee of a bank overdraft or an uncalled liability on shares, and a liability " where liability is certain but " the ultimate amount that will be payable depends on a con- " tingency." Only the first class were contingent debts for the purpose of subsection (2) (*d*). A life annuity belonged to the second class. Further, they held that there could not be any doubt that the amount of the debt represented by the annuity was capable of estimation for the purposes of the same subsection, and that the opinion recorded by the appellant to the opposite effect must have been founded on some misapprehension of the relevant law and could not be allowed to prevail.

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* (1933) 49 C.L.R. 293.

Thus the order of the court which was now appealed from was to the effect that the allowance to which the respondent was entitled for the liability of the deceased under the annuity deed ought to be estimated on the proper actuarial basis in respect of the annuity.

1955. Nov. 29, 30; Dec. 1. *Neil Lawson Q.C.*, *J. Byrne* (New Zealand) and *T. H. H. Skeet* for the appellant. The appeal raises a question of public importance, because since the Death Duties Act, 1921, and its predecessor Act of 1909 the Commissioner of Stamp Duties has consistently refused to allow a deduction for estate duty purposes of a sum such as the present on the basis of actuarial valuation. The practice, which has never been challenged before, has been followed in Australia on a similarly worded statute. The question is whether a life annuity, in respect of which the deceased was liable under covenant, is properly to be described as a contingent debt or other debt the amount of which is, in the opinion of the commissioner, incapable of estimation. It is largely a question of construction of the New Zealand statute.

The main issue is whether this particular debt was a contingent debt; if it was, then it is submitted that on the proper construction of section 9 (2) (*d*) of the Act of 1921 the question of the opinion of the commissioner does not come into the matter at all. On analysis, there are three questions here: (1) Whether on its true construction section 9 (2) (*d*) creates two separate and distinct categories of debts, the first being contingent debts, without qualifying words, and the second debts the amount of which is, in the opinion of the commissioner, incapable of estimation, or whether the words " the amount of which is, in the

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"opinion of the commissioner, incapable of estimation" apply to both the earlier categories of debts—"contingent debts" and "other debts." (2) Assuming the answer to the first question be that there are separate categories in section 9 (2) (*d*), is this particular liability prohibited from allowance because it is a contingent debt? (3) Assuming, contrary to the appellant's submission, that this is a debt the amount of which is capable of estimation, in fact is the opinion of the commissioner to the contrary open to review by the court?

On the first question it is submitted that the proper construction of section 9 (2) (*d*) is to create separate categories of debts. [*Schaeffer* v. *Commissioner of Stamp Duties*[1] was referred to.] The answer to the second question is that this particular debt falls within the contingent debt category and is not an allowable deduction. The Court of Appeal's view that there are two categories of contingent debts is wrong. There is really no basis on the language of the Act itself for creating a further subdivision in the class of contingent debts or for giving contingent debts any meaning other than that which they have ordinarily been held to have in a long series of cases. The authorities show that annuities have consistently been considered as contingent debts: *In re Bacon, Grissel* v. *Leathes*,[2] and see the bankruptcy cases, *In re Dummelow, Ex parte Ruffle*,[3] *Ex parte Blakemore*[4] and *Ex parte Neal, In re Batey*.[5] In the bankruptcy cases concerning annuities the statute has already provided that contingent debts which can be valued shall be admitted to proof. The use made below of those bankruptcy cases disregards the whole basis on which they proceeded. So far as the administration cases are concerned, *In re Hargreaves*[6] is of assistance because it shows quite clearly that the Court of Appeal took the view that so far as a life annuity is concerned the beneficiaries under the covenant of annuity are not creditors for the purpose of getting administration unless and until an instalment of annuity has fallen actually payable and has not been paid. [Reference was also made to *In re Arnold, Calvert* v. *Whelan*,[7] *In re Thomas, Public Trustee* v. *Falconer*[8] and *In re Fenwick's Will Trusts, Fenwick* v. *Stewart*.[9]] The most recent case on the way in which annuities are to be treated is *Westminster Bank Ltd.* v. *Inland Revenue*

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[1] [1939] N.Z.L.R. 603.
[2] (1893) 62 L.J.Ch. 445, 446.
[3] (1873) L.R. 8 Ch. 997, 1000.
[4] (1877) 5 Ch.D. 372, 374.
[5] (1880) 14 Ch.D. 579.
[6] (1890) 44 Ch.D. 236, 239.
[7] [1942] Ch. 272; 58 T.L.R. 185; [1942] 1 All E.R. 501.
[8] [1946] Ch. 36; 62 T.L.R. 23; [1945] 2 All E.R. 586.
[9] [1936] Ch. 720; [1936] 2 All E.R. 1096.

Commissioners[10]; Harman J. is there treating the annuity so far as concerns the instalment which may fall due after the death of the husband—the relevant date—as a contingent debt.

The principle it is sought to establish is that in considering annuities the courts regard the right of the annuitant, being otherwise than to payments that have already fallen due, as being a right which is contingent on the survival; or, looking at it from the point of view of the covenantor or debtor, as a contingent debt or liability fructifying only on the occurrence of the uncertain event or survival of the annuitant. Reliance is placed on *Webb* v. *Stenton*[11] to support the submission that there is a clear distinction between debts which are payable in future as a matter of certainty and debts which only become payable in the event of a contingency. The English case which appears to get nearest to the point is *In re Arnold*,[12] in which Simonds J. referred to annuities as a class of contingent liabilities which had to be treated rather specially and separately.

The Australian cases are *In re Robertson*[13]; *In re Syme, Union Trustee Co. of Australia Ltd.* v. *Syme*,[14] where an annuity to a widow was treated as a contingent liability, and the annuitant as not an actual creditor so long as no instalment of the annuity was in arrear; *Commissioner of Stamp Duties* (*N.S.W.*) v. *Brasch*[15]; *Bakewell* v. *Deputy Federal Commissioner of Taxation* (*S.A.*),[16] and *Commissioner of Stamp Duties* (*N.S.W.*) v. *Permanent Trustee Co. of New South Wales* (*Hill's* case),[17] which is important, though the words of the Act in Australia are somewhat different. Two other English cases which give some assistance are *O'Driscoll* v. *Manchester Insurance Committee*[18] and *In re Duffy, Lakeman* v. *Attorney-General*,[19] which contains a discussion of what is meant by contingent liabilities.

With regard to the third question, assuming that the court were to come to the conclusion that the debt in this case was a debt the amount of which is capable of estimation, whether those words qualify either "contingent debts" or "other debts," it is submitted, upon that assumption, that the court below was wrong in interfering with the commissioner's decision, which was based on his opinion that the amount of the debt was not capable of estimation, and was wrong for these reasons: (1) The relevant section of the Act, section 62, does not make any provision enabling the court to exercise any supervisory jurisdiction over a matter which is left to the opinion of the commissioner. (2) Even if the effect of the Act were, contrary to that submission, to give the court this supervisory jurisdiction, the commissioner's opinion on this point was a matter of fact, and as such was not challenged by the respondent and must therefore be presumed to be a correct statement of fact. (3) A conclusion of opinion is only open to review, assuming that the court has jurisdiction to review, when the opinion is based on a wrong interpretation of a statute, or is so irrational that it is not an opinion at all, or if it is an opinion which is formed arbitrarily or illegally.

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[10] [1954] 1 W.L.R. 242; [1954] 1 All E.R. 240.

[11] (1883) 11 Q.B.D. 518.

[12] [1942] Ch. 272.

[13] (1897) 18 N.S.W. 239.

[14] [1933] V.L.R. 282.

[15] (1937) 57 C.L.R. 69.

[16] (1937) 58 C.L.R. 743.

[17] (1933) 49 C.L.R. 293.

[18] [1915] 3 K.B. 499; 31 T.L.R. 532.

[19] [1949] Ch. 28; 64 T.L.R. 545; [1948] 2 All E.R. 756.

In summary: the first major question is whether the words in the second head of section 9 (2) (*d*) qualify contingent debts. It is submitted that they do. " Other debts " is using the word " other " to contrast them with a debt of a specific kind which has first been mentioned. It means debts other than contingent debts. Section 9 (3) supports that view, and that view does not make nonsense of the second limb. The word " amount " is used, not " value," which is an important factor. On the second major question, this is in principle a contingent debt as used in section 9 (2) (*d*). The overwhelming weight of authority has proceeded on the basis that annuities are contingent debts or has specifically treated them as such. There is no basis for the subdivision of contingent debts into two categories. Finally, the practice of the Revenue in New Zealand and Australia, which is to a large extent based on *Hill's* case,[20] is a proper practice in accordance with the construction of the section.

Sir Wilfrid Sim Q.C. (New Zealand), *J. A. Brightman* and *G. H. Gould* (New Zealand) for the respondent. Three questions cover the whole matter: (1) The construction and application of section 9 (1), that is to say, whether the annuity is a debt. (2) The construction and application of section 9 (2), that is to say, whether the annuity is within the disallowances or exclusions. (3) Which is subsidiary, whether the respondent is precluded from challenging the view of the commissioner on this so-called question of fact.

With regard to the first question—whether the annuity was a debt within the meaning of section 9 (1)—all the judges below were unanimous that this debt or annuity did fall within section 9 (1), and that it should be allowed unless it fell within (2) (*d*).

[20] 49 C.L.R. 293.

A debt may arise even though the quantum of it may be uncertain: *O'Driscoll* v. *Manchester Insurance Committee.*[21] In the present case the obligation to pay arose immediately on the death; it was an obligation then existing and terminable on the death of the annuitant. The true character of this obligation was decided as long ago as 1866 in *Mitcalfe* v. *Hanson*,[22] in which it was held that a covenant to pay recurring premiums on a life policy is an absolute covenant and does not constitute a "liability to pay "money upon a contingency." That case was followed without comment in *Deering* v. *Bank of Ireland*[23] and was referred to in *Ex parte Wiseman, In re Kelson, Tritton & Co.*,[24] *Robinson* v. *Ommanney*[25] and *Ex parte Blakemore.*[26] This was a debt within section 9 (1).

There was here a liability to bear the annuity: for the meaning of "liability" in the abstract, see *S.I.M.U. Mutual Insurance Association* v. *Minson's Ltd.*[27] Here in a general sense the estate is charged with the payment of the annuity, and in that sense *In re Arnold*[28] is an illustration. It is a burden on the estate and in that sense constitutes a debt within the meaning of section 9 (1). As illustrating how far the special definition of "debt" in a revenue statute can extend in promoting deduction, see *Equity Trustees Executors and Agency Co. Ltd.* v. *Federal Commissioner of Taxation*[29] as explained in *Bakewell's* case.[30] The judges below were therefore right in holding that the debt was one falling within section 9 (1), and that the calculation of the debt in reference to the anticipated life of the annuitant could be and should be properly brought in subject to section 9 (2).

There is only one proper approach to section 9 (2)—to take the actuarial value of the annuity, and that is the debt which the estate has to pay. That is capable of estimation: *Westminster Bank Ltd.* v. *Inland Revenue Commissioners*[31]; *In re Longbourne's Settlement Trusts.*[32] It is said in Green on Death Duties, 3rd ed., p. 318: "In the case of an annuity or other "periodic payment out of the free estate, whether charged on "specific property or not, the appropriation deduction is the "actuarial value." See also Dymond's Death Duties, 20th ed., pp. 440–441. If possible, a construction must be avoided which would lead to a basically unfair result, and, if there be ambiguity, the fair result must be deemed to have been intended as against the unfair result.

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[21] [1915] 3 K.B. 499.
[22] (1866) L.R. 1 H.L. 242.
[23] (1886) 12 App.Cas. 20.
[24] (1871) L.R. 7 Ch. 35.
[25] (1882) 21 Ch.D. 780.
[26] 5 Ch.D. 372.
[27] [1938] N.Z.L.R. 829.
[28] [1942] Ch. 272.
[29] (1936) 55 C.L.R. 459.
[30] 58 C.L.R. 743.
[31] [1954] 1 W.L.R. 242.
[32] [1952] 2 T.L.R. 818; [1952] 2 All E.R. 933.

The Australian authorities are really of little help in determining either debt or contingent debt within the meaning of section 9 (2). *In the Will and Estate of James Leonard Kininmonth*[33] was in effect disapproved in *In re Robertson*,[34] *Hill's* case[35] and *Bakewell's* case.[36] It is submitted that *Kininmonth's* case[37] can be supported from the English practice under the authorities which were cited. *Commissioner of Stamps (W.A.)* v. *West Australian Trustee, Executor and Agency Co. Ltd.*[38] illustrates that a sum, though uncertain at the time of the death, if it awaited computation in the future, is not prevented from being a debt. The interpretation given to the word "debt" by the Australian courts is to be regarded very much in the light of the statutes then being construed. The present statute must be construed on its own language.

Leaving the question of debt simpliciter and proceeding to examine the conception of contingent debt, the appellant argued that this annuity is a contingent debt and has been recognized as such in the law. It is submitted that there is nothing in the authorities cited for the appellant which establishes either that this is a contingent debt or that the word "contingent" has obtained a significance in the law which the legislature must be deemed to have adopted when it used the term in section 9 (2) (*d*). In other words, the approach to section 9 (2) (*d*) is unfettered so far as the present matter is concerned by compelling authority as to what contingent debt in the section means. *Rice* v. *Commissioner of Stamp Duties*[39] is of value and guidance as to what can amount to a contingency in the circumstances now being considered. That case is authority for the view that mere uncertainty of life—terminability of the annuity—is not a contingency within the acceptance of that term, certainly not within the view that the Board took of the matter in *Rice's* case,[39] and that applies to the New Zealand section.

The bankruptcy cases cited for the appellant relate more to the term "capable of estimation" than to the definition or determination of what is a contingency, and they do not assist on the question whether this particular debt was a contingent debt or not. [*Ex parte Neal*[40] and *In re Arnold*[41] were referred to.] In the garnishee cases, also, there were very different considerations to be taken into account, and they are of no assistance on the question of contingency.

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[33] (1897) 23 V.L.R. 134.
[34] 18 N.S.W. 239.
[35] 49 C.L.R. 293.
[36] 58 C.L.R. 743.
[37] 23 V.L.R. 134.
[38] (1925) 36 C.L.R. 98.
[39] [1954] A.C. 216.

So the submissions which lead up to the question of the construction and application of section 9 (2) are: (1) The width of section 9 (1) is emphasized. (2) There is no convincing authority that an annuity is a contingent debt. The governing cases are *Mitcalfe's* case[42] and *Rice's* case,[43] which incline against the view that an annuity is a contingent debt. (3) The word "contingent" has not been given by law a meaning with any finality that the legislature might be deemed to have adopted it in the section. The result is that the way is open to the Court of Appeal and to this Board for a free approach to the interpretation of the language of the section and its application to annuities. There are three conceptions as to how the section may be applied: (a) An incomplete or inchoate liability wholly contingent for its existence on a future uncertain event. (b) A liability which crystallizes only when it falls due for payment—being contingent on the future question of amount. (c) An existing liability awaiting measurement as to quantum only, liability being not dependent upon those. Stanton J.'s reasons in the Court of Appeal produced a result which is wholly in accord with the general sense of the section—that liabilities which are capable of estimation are to be considered exempt. Fair J. produced the same result, but by a little different process of reasoning. They were right in their view. Section 9 (3) does not confirm the submission for the appellant that an annuity is a contingent debt. The extracts from *Hill's* case[44] cited by Northcroft J. in his judgment in the Supreme Court were not necessary for the ground on which they decided the appeal and may be regarded as dicta only.

An alternative view, on which the respondent would still be exempt, is that the second limb does govern the first—contingent debts which are incapable of estimation in the opinion of the commissioner—for they will still be capable of estimation. Following that through, if it is a contingent debt, that particular class of so-called contingent debt would also be within the allowances, because that is a liability charged owing at the date of the death, and is capable of estimation, and is always so treated as such in England. So, whichever way the section is looked at, the respondent's case must be upheld.

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[40] 14 Ch.D. 579.

[41] [1942] Ch. 272.

[42] L.R. 1 H.L. 242.

[43] [1954] A.C. 216.

[44] 49 C.L.R. 293, 298, 300, 303, 304.

With regard to the opinion of the commissioner; it is appealable; and it is submitted also (a) that it is capricious and arbitrary, and (b) that following long usage and judicial authority the commissioner must be deemed to have exceeded the bounds of his administrative discretion: *Commissioner of Stamp Duties (N.S.W.)* v. *Pearse* [45]; and (c) the commissioner made his decision contrary to law and he must be deemed to have misconstrued the meaning of the word "estimate." As to the point that it is not open on this appeal to the respondent to challenge the expression of opinion given by the commissioner, this point is not open to the appellant in this tribunal, for the reasons that it was not taken in the Supreme Court or the Court of Appeal, where it could have been taken, and in consequence this Board is invited to deal with the matter without having any assistance from the New Zealand judges as to the course of practice or an effective record of what happened in the Court of Appeal. The judgment appealed from is right.

Brightman following. This case falls into a very small compass; there are only two substantial questions: (1) Whether the obligation to pay a life annuity can properly be described as a contingent liability. (2) If it can properly be so described, whether the relevant words in section 9 (2) (*d*)—which is incapable of estimation—apply to a contingent liability. According to the appellant, the right of the annuitant is a right to a series of instalments, with this curious result on the appellant's case, that an annuity remains contingent throughout the life of the annuitant. It is not correct to regard an annuity as a series of contingent rights; it is a right which vested when the annuity commenced. [*Webb* v. *Stenton* [46] was referred to.] On the second main question; there is no reason why, for the purposes of estate duty, a contingent debt which is capable of estimation should not be allowed as a deduction. Only those incapable of estimation are not allowed. Further, if the appellant is right it would result in double taxation: *Attorney-General* v. *Duke of Richmond and Gordon.*[47]

Neil Lawson Q.C. in reply. If the legislature had intended that all debts, including contingent debts which were capable of estimation, should be an allowance, nothing would have been easier than to say so. There is unanimity among the Australian judges that annuities are, for the purposes of the revenue legislation they were dealing with, to be treated as contingent debts: *Hill's* case.[48] This statute should be construed in accordance with the presumed intention of the New Zealand legislature.

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[45] [1954] A.C. 91.

[46] 11 Q.B.D. 518.

[47] [1909] A.C. 466, 479; 25 T.L.R. 775.

1956. Feb. 15. The judgment of their Lordships was delivered by Lord Radcliffe, who stated the facts set out above and continued: The issue depends almost entirely upon the effect of section 9 of the Death Duties Act. In their Lordships' view the essential question in this case is not the bare question, is the liability for an annuity for life a contingent debt? Indeed, it is very difficult to answer such a question in isolation, since the nature of the answer will depend upon the context to which the existence of the contingency is relevant. No doubt any particular amount which is claimed to be due in respect of the liability at the date of death (except the small accrued sum due by apportionment) is only contingently due in the sense that it cannot be said with certainty that it or any part of it will have to be paid out of the estate. The sum that will have to be paid depends on the number of months that the annuitant survives. No doubt, too, the value of the annuity estimated on actuarial principles is not the same thing as the amount of the debt itself. On the other hand, it may be that there is a relevant distinction for this purpose between a liability for an annuity accruing de die in diem and only terminating with the death of the annuitant and a liability which, while not the less incurred by the date of death, will not result in a pecuniary debt except in a future event as yet uncertain. Their Lordships do not think it necessary to express an opinion on this point, which is admittedly a difficult one, since in their view the allowance or rejection of a life annuity as a debt to be allowed against the final balance of an estate can be decided more satisfactorily by reviewing the wording of section 9 as a whole.

First, is the annuity " a debt owing by the deceased at his " death "? Having regard to the interpretation of " debt " in section 2 as including " any pecuniary liability, charge, or " encumbrance," it is clear that it is: and, if so, it is to be allowed under subsection (1) of section 9 " save so far as other- " wise provided by this Act." The main grounds of exclusion are set out in subsection (2) of the same section, and of the four subheadings subhead (*d*) stands apart from the others. It is expressed in a form which is itself productive of some ambiguity:

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[48] 49 C.L.R. 293, 304.

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—" For contingent debts or any other debts the amount of which " is, in the opinion of the commissioner, incapable of estimation." If the relative clause qualifies both the preceding phrases a liability which is admissible under subsection (1) is not disallowed, even if contingent, so long as it is not incapable of estimation: while, if the relative clause qualifies only the phrase " any other debts," which immediately precedes it, any liability properly described as contingent is disallowed merely by that fact, even though it is readily capable of estimation.

Their Lordships do not think that the latter gives a reasonable construction of an ambiguous sentence. There is nothing in its favour except the grammatical argument that the word " debts " should not have been used twice if the relative clause was intended to cover contingent as well as other debts, and the point, in itself of little weight, that there was no need to refer to contingent debts at all if the sentence was intended to mean no more than that any debt which was incapable of estimation was to be disallowed. If it is said that a contingent debt was meant to be disallowed as such and without qualification because it was regarded by the legislature as an obvious example of a liability which could be safely assumed to be incapable of estimation, the argument turns round upon itself, since then it becomes highly improbable that the phrase " contingent debt " was intended to cover a life annuity, the obligation under which is of all uncertainties the one most readily capable of estimation. And the explanation leaves unexplained how it could be fair or reasonable to provide that no debt that was not a contingent debt was to be disallowed, if capable of estimation, while a debt that was a contingent debt was not to be allowed, even if capable of estimation.

In the light of these considerations their Lordships are of opinion that the meaning of subsection (2) (*d*) is that the only debts within the meaning of subsection (1) which are disallowed are those the amount of which is, in the commissioner's opinion, incapable of estimation. On this basis it does not matter whether the annuity is to be thought of as a contingent debt or not. The section does not say, but it is necessarily to be assumed, that if there is a debt the amount of which is capable of estimation that amount is itself to be treated as the debt and allowed as such. Their Lordships are not unmindful that in the case stated the appellant recorded the opinion that " the liability of " the deceased under the said deed as from his death is incapable " of estimation." But having regard to the known practice of

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the valuation of life annuities on actuarial principles for many purposes, including bankruptcy, administration and insurance business, they are content to accept the view of the Court of Appeal on this point, that he must have been acting under some misapprehension of the applicable law when he committed himself to this view.

The reading of the section which has been adopted by their Lordships makes it unnecessary to consider the case of *Commissioner of Stamp Duties (N.S.W.)* v. *Permanent Trustee Co. of N.S.W. Ltd.*[1] to which Northcroft J. made detailed reference in his judgment in the Supreme Court. For, while it is true that the effect of that decision was to exclude a life annuity from allowance under the Death Duties Act of New South Wales, the ground of the decision was that under that Act the basic condition of allowance of any debt was that it must be " actually " due and owing " at the date of death (see section 107 (1) of the Act). If a debt was not capable of being so described—and, whatever else can be said about the liability to pay a life annuity it is hard to see how it can properly be described in those terms—the range of allowance was not impliedly extended by the presence of a subsection (2) (*d*) in the same terms as subsection (2) (*d*) of the New Zealand Act, from which circumstance it had been sought to draw the conclusion that any liability ought to be allowed against the dutiable estate if, though a contingent debt, it was capable of estimation. The High Court rejected this argument, holding that the prohibition contained in subsection (2) could not be construed as an implied enlargement of the phrase " actually due and owing " in subsection (1). It is plain that there is a material difference between the words " actually due and owing " in the New South Wales Act and the words " owing by the deceased " (as interpreted by section 2) in the New Zealand Act. Further, there was no definition of " debt " in the New South Wales Act, as there is in section 2 of the New Zealand Act. Accordingly, the decision of the High Court of Australia does not therefore bear upon the issue of the present case.

For these reasons their Lordships will humbly advise Her Majesty that the appeal should be dismissed. The appellant must pay the respondent's costs of the appeal.

Solicitors: *Mackrell, Maton & Co.; Neish, Howell & Haldane.*

C. C.

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[1] (1933) 49 C.L.R. 293.

[HOUSE OF LORDS.]

GALLOWAY . . . . APPELLANT; H. L. (E.)*

AND

GALLOWAY (*Ex parte*) . . . . . RESPONDENT.

1955
July 11, 12.
Nov. 2.

Infant—Custody—Divorce court—Child born in adultery—Subsequent marriage and divorce of parents—Jurisdiction to order custody—"Children the marriage of whose parents is the subject of the "proceedings"—Matrimonial Causes Act, 1950 (14 *Geo.* 6, *c.* 25), *s.* 26 (1).

Statute — Construction — Re-enactment of section — Judicial opinion expressed meanwhile as to meaning — "Children" — Matrimonial Causes Act, 1950, *s.* 26 (1).

Judicial Precedent—House of Lords, application of principle by—Considerable body of authority below—Parliamentary enactments with knowledge thereof—Construction of enactments.

The expression "children" in section 26 (1) of the Matrimonial Causes Act, 1950, is not confined to legitimate children but includes also illegitimate children, including those children born before the marriage of their parents in circumstances which preclude their legitimation under the Legitimacy Act, 1926.

A wife, on an application for the dissolution of her marriage, asked for the custody and maintenance of the child of herself and her husband born before the marriage and at a time when the husband was married to another woman. The Special Commissioner held that the court had no jurisdiction to make orders in respect of this particular category of illegitimate child, and his decision was affirmed by the Court of Appeal. On appeal by the wife:—

Held (Viscount Simonds and Lord Cohen dissenting), that the jurisdiction of the court under section 26 (1) of the Matrimonial Causes Act, 1950, extended to an illegitimate child born of parents in circumstances precluding its legitimation per subsequens matrimonium. By virtue of the language adopted in the subsection the test of parenthood had been substituted for legitimacy.

Judgments of Denning L.J. in *M.* v. *M.* [1946] P. 31; 62 T.L.R. 16; [1945] 2 All E.R. 525 and *Packer* v. *Packer* [1954] P. 15, 21; [1953] 2 All E.R. 127 approved. *Harrison* v. *Harrison* [1951] P. 476; [1951] 2 T.L.R. 242; [1951] 2 All E.R. 346 overruled.

Per Lord Tucker. I would be disposed to accept a different construction if there existed a considerable body of authority—although not binding on this House—which had been acted on for many years, and which must be assumed to have been in the mind of Parliament on the occasions when section 35 of the Act of 1857 has been amended or re-enacted. The precise point has not, however, been the subject of express decision until 1951.

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* *Present*: VISCOUNT SIMONDS, LORD OAKSEY, LORD RADCLIFFE, LORD TUCKER and LORD COHEN.

[Reported by J. A. GRIFFITHS, Esq., Barrister-at-Law.]

Decision of the Court of Appeal [1954] P. 312; [1954] 2 All E.R. 143 reversed.

APPEAL from the Court of Appeal (Jenkins and Hodson L.JJ., Singleton L.J. dissenting).

This was an appeal in forma pauperis by the appellant from an order of the Court of Appeal dated April 13, 1954, affirming part of an order by Judge Lawson Campbell, sitting as Special Commissioner in divorce at Cambridge, dated November 26, 1953, whereby he refused to make an order for custody of a child, John Allen.

On May 15, 1952, the appellant, Rose Helen Galloway, was married to the respondent, Owen George Galloway. Before that date they had lived together, and on August 17, 1950, the appellant had given birth to a child, John Allen, of whom the respondent was the father, at a time when he was married to another woman. Later that wife divorced him and he married the appellant, the result being that the provisions of the Legitimacy Act, 1926, did not apply to render the child legitimate per subsequens matrimonium.

On August 14, 1953, the appellant (having obtained leave to do so notwithstanding that three years had not elapsed) presented a petition for the dissolution of her marriage on the grounds of her husband's desertion and adultery. By way of relief she asked, in addition to the dissolution of the marriage, for orders giving custody of the child to her and making provision for his maintenance.

The suit, which was not defended by the husband, was heard by Judge Lawson Campbell, who granted the appellant a decree of dissolution of the marriage, but refused the application for custody of the child, holding, on the basis of the decision in *Harrison* v. *Harrison*,[1] that the court could not make an order under section 26 (1) of the Matrimonial Causes Act, 1950,[2] for the custody of a child if the child's father or mother was married to another person when the child was born. He gave leave to the petitioner (appellant) to appeal. The husband (respondent) was not represented and did not appear on the appeal, but, at the suggestion of the court, the Queen's Proctor was represented in order to assist the court.

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[1] [1951] P. 476; [1951] 2 T.L.R. 242; [1951] 2 All E.R. 346.

[2] Matrimonial Causes Act, 1950, s. 26: "(1) In any proceedings for "divorce or nullity of marriage or "judicial separation, the court may "from time to time, either before or "by or after the final decree, make "such provision as appears just with "respect to the custody, maintenance "and education of the children the "marriage of whose parents is the "subject of the proceedings, or, if it "thinks fit, direct proper proceedings "to be taken for placing the children "under the protection of the court. "(2) On an application made in that "behalf, the court may, in any pro-"ceedings for restitution of conjugal "rights, at any time before final

[NOTE: On May 11, 1953, in *Packer* v. *Packer*,[3] a division of the Court of Appeal (Denning and Morris L.JJ.) heard an appeal from a decision in which *Harrison* v. *Harrison*[4] had been followed, and, the court being equally divided in opinion, the appeal was dismissed.]

The Court of Appeal (Singleton L.J. dissenting) dismissed the appeal, but gave leave to the appellant to appeal.

J. E. S. Simon Q.C. and *Robert Elborne* for the appellant. The question is whether under section 26 (1) of the Matrimonial Causes Act, 1950, the court has jurisdiction to make an order for the custody of an illegitimate child of the appellant and respondent which was born before marriage and is not rendered legitimate by section 1 (2) of the Legitimacy Act, 1926.

Section 26 of the Matrimonial Causes Act, 1950, re-enacted without material alteration section 193 of the Supreme Court of Judicature (Consolidation) Act, 1925, as amended by section 10 of the Matrimonial Causes Act, 1937. Section 193 (1) of the Supreme Court of Judicature (Consolidation) Act, 1925, re-enacted without material alteration the combined provisions of section 35 of the Matrimonial Causes Act, 1857, and section 4 of the Matrimonial Causes Act, 1859; and section 193 (2) of the Supreme Court of Judicature (Consolidation) Act, 1925, re-enacted without material alterations section 6 of the Matrimonial

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"decree, or if the respondent fails "to comply therewith, after final "decree, make from time to time all "such orders and provisions with "respect to the custody, maintenance "and education of the children of the "petitioner and respondent as might "have been made by interim orders "if proceedings for judicial separa- "tion had been pending between the "same parties. (3) On any decree of "divorce or nullity of marriage, the "court shall have power to order the "husband, and on a decree of "divorce made on the ground of the "husband's insanity, shall also have "power to order the wife, to secure "for the benefit of the children such "gross sum of money or annual sum "of money as the court may deem "reasonable, and the court may for "that purpose order that it shall be "referred to one of the conveyancing "counsel of the court to settle and "approve a proper deed or instru- "ment to be executed by all neces- "sary parties: . . ."

[3] [1954] P. 15; [1953] 2 All E.R. 127.

[4] [1951] P. 476.

Causes Act, 1884, which section is reproduced in section 26 (2) of the Act of 1950.

Children are referred to in the Matrimonial Causes Act, 1950, as follows:—

(a) Section 2 (2) (re-enacting section 1 (2) of the Matrimonial Causes Act, 1937) provides that in determining any application for leave to present a petition within three years of marriage regard shall be had to "the interests of any children of the "marriage."

(b) Section 9 (re-enacting section 7 (2) of the Matrimonial Causes Act, 1937) provides that "where a decree of nullity is "granted in respect of a voidable marriage, any child who "would have been the legitimate child of the parties to the "marriage if it had been dissolved, instead of being annulled, at "the date of the decree shall be deemed to be their legitimate "child notwithstanding the annulment."

(c) Section 23 (1) (re-enacting section 5 of the Law Reform (Miscellaneous Provisions) Act, 1949) empowers the court to make orders for maintenance where a husband has been guilty of wilful neglect to maintain his wife "or the infant children of "the marriage."

(d) Section 24 (1) and (2) (re-enacting section 191 (1) and (2) of the Supreme Court of Judicature (Consolidation) Act, 1925, which in turn re-enacted section 45 of the Matrimonial Causes Act, 1857) enable settlements to be made of a guilty wife's property "for the benefit . . . of the children of the marriage."

(e) Section 25 (which re-enacted section 192 of the Supreme Court of Judicature (Consolidation) Act, 1925, which in turn re-enacted section 5 of the Matrimonial Causes Act, 1859) empowers the court, after pronouncing a decree of divorce or nullity of marriage, to make orders for the variation of settlements "for the benefit of the children of the marriage," and the court may exercise the powers conferred by the section "notwithstanding that there are no children of the marriage."

(f) In section 26 (1) as "the children the marriage of whose "parents is the subject of the proceedings."

(g) In section 26 (2) (dealing with proceedings for restitution of conjugal rights) as "the children of the petitioner and "respondent."

(h) In section 26 (3) (dealing with secured provision) as "the children."

(i) Section 30 (3) (re-enacting section 189 (3) of the Supreme Court of Judicature (Consolidation) Act, 1925, which in turn re-enacted section 33 of the Matrimonial Causes Act, 1857) enables the court to direct a settlement of any damages recovered on a petition "for the benefit of the children, if any, of the "marriage."

It is submitted that upon its true construction the words of section 26 (1) cover a child of the parties to the proceedings whether the child is legitimate or illegitimate. Section 26 (1) does not confer the jurisdiction with respect to "children of the "marriage which is the subject of the proceedings," but with respect to "children the marriage of whose parents is the subject "of the proceedings." This peculiar periphrasis, as contrasted with the expression "children of the marriage" used in the various other sections referred to above, must have been used advisedly and for some purpose. It is literally apt to include illegitimate children whose natural parents subsequent to their birth contract a marriage which becomes the subject of proceedings.

It is true that it is a well-established and well-known rule of construction that the words "child" or "children" in a statute prima facie mean "legitimate child" or "legitimate "children": *Woolwich Union* v. *Fulham Union*.[5] But section 26 (1) extends to proceedings for nullity of marriage, and therefore to children of void marriages who must clearly be illegitimate: see *Langworthy* v. *Langworthy*.[6] As the law stood in 1857 and 1925 this category of illegitimacy was wider than it is now, as it included children of voidable marriages when annulled, whose case is now covered by the status of legitimacy conferred by section 9 of the Act of 1950. Accordingly, the word "children" in section 26 (1) cannot be construed as confined to legitimate children, and must be read as meaning children whether legitimate or illegitimate, and as bearing the same meaning in relation to proceedings for the dissolution of a valid marriage as it bears in relation to proceedings for nullity in respect of a void marriage.

There is little authority precisely on the point in issue. In *Harrison* v. *Harrison*,[7] which it is now sought to overrule, *Langworthy* v. *Langworthy*,[8] was distinguished on the ground that the section gives express power to grant custody in nullity proceedings; although it does not appear from the judgments in *Langworthy* v. *Langworthy*[8] whether or not the court regarded the express power given by the statute as the sole basis for its decision. *Bednall* v. *Bednall*,[9] *Green* v. *Green*,[10] *Jones* v. *Jones*,[11] *M.* v. *M.*,[12] and *Colquitt* v. *Colquitt*[13] were all cases in which the issue was as to the power of the court to grant custody of children who had been legitimated. In the first three of those cases the court held that a child born illegitimate was without the cognizance of the court even though subsequently legitimated. Denning J., in *M.* v. *M.*,[14] disagreed with those decisions, and expressed the view that the test of jurisdiction under section 26 (1) was parenthood and not legitimacy. That decision was approved in *Colquitt* v. *Colquitt*,[15] but it was suggested there that the test propounded in *M.* v. *M.*[16] was too wide.

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[5] [1906] 2 K.B. 240.

[6] (1886) 11 P.D. 85.

[7] [1951] P. 476.

[8] 11 P.D. 85.

In *Packer* v. *Packer*,[17] where the facts were indistinguishable from those in the present case, a division of the Court of Appeal (Denning and Morris L.JJ.) heard an appeal from a decision in which *Harrison* v. *Harrison*,[18] had been followed. Denning L.J. adhered to the view which he had expressed in *M.* v. *M.*[19] and was for allowing the appeal on the ground that section 26 (1) did extend to illegitimate children. Morris L.J., on the other hand, was for dismissing the appeal, taking the contrary view as to the ambit of the subsection, and the court being thus equally divided, the appeal was dismissed.

It will be noted that the precise point in issue in the present case did not come before the courts for determination until 1951. It is submitted that the law was correctly laid down by Denning L.J. in *M.* v. *M.*[20] and *Packer* v. *Packer*.[21] Morris L.J. in *Packer* v. *Packer*[22] appears to have based his decision for dismissing the appeal on the following grounds: "The considera-" tion of main importance is that in section 35 of the Act of " 1857, as in section 26 (1) of the Act of 1950, the words 'the " 'custody, maintenance and education of the children, the " 'marriage of whose parents is the subject of the proceedings' " are to be found. The question to be determined is whether in " the context the word 'children' includes those who at the " time are illegitimate. . . . If the wording of section 26 (1) is " clear then, of course, it must be given full effect, but it is not " without some significance that in a situation which could so

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[9] [1927] P. 225.
[10] [1929] P. 101.
[11] (1929) 45 T.L.R. 292.
[12] [1946] P. 31.
[13] [1948] P. 19.
[14] [1946] P. 31.
[15] [1948] P. 19.
[16] [1946] P. 31.
[17] [1954] P. 15.
[18] [1951] P. 476.
[19] [1946] P. 31.
[20] Ibid.
[21] [1954] P. 15.
[22] Ibid. 24, 25.

"very often have arisen since 1857 there is no trace, until comparatively recently, of the point being taken that, on a dissolution of marriage, there may be orders for maintenance and custody of illegitimate children if the parties assert and admit that they are, in fact, the parents of those children.

"It may well be that it would on occasion be very convenient if on a decree of divorce the court could make orders as to the custody, maintenance and education of those acknowledged by the parties to be their illegitimate children. But considerations of convenience are for the legislature. The question for the court is one of construction of the Act. It is to be noted that it was provided by section 7 of the Guardianship of Infants Act, 1886, that in any case where a decree for judicial separation or a decree, either nisi or absolute, for divorce shall be pronounced, the court pronouncing such decree may thereby declare the parent, by reason of whose misconduct such decree is made, to be a person unfit to have the custody of the children (if any) of the marriage. If by the then existing law the court had power to deal with the custody, maintenance and education of all children of the parties whether legitimate or not, it is difficult to see why the power given by section 7 of the Act of 1886 should only have been given in reference to the children of the marriage."

The following submissions are put forward in respect of Morris L.J.'s observations: (1) The wording of an Act of 1886 is of slight value in interpreting a statute of 1857. (2) The argument based on section 7 of the Act of 1886 is equally applicable to *all* illegitimate children, including those rendered illegitimate by a determination that the marriage of their parents was void. Accordingly, if the above were a sound argument it would be valid to show that the decision in *Langworthy* v. *Langworthy*,[23] which, hitherto, has never been questioned, was wrongly decided. (3) In any event, the argument is unsound, for there is no *legal* right to the custody of an illegitimate child (see *Barnardo* v. *McHugh*[24]), and, therefore, an illegitimate child could not come within section 7 of the Act of 1886; nor was such a child within the contemplation of the section, which was confined to cases of decrees for judicial separation and divorce and did not extend to decrees for nullity.

In *Bryant* v. *Bryant*,[25] which was heard by the Court of Appeal subsequent to the hearing of the appeal in the present

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[23] 11 P.D. 85.

[24] [1891] A.C. 388, 398.

[25] [1955] P. 164.

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case, that court held, following *Langworthy* v. *Langworthy*,[26] that the mother of two children, whose marriage (before their birth) to the father of the children had been pronounced by the court to be null and void on the ground of the father's bigamy, was entitled to an order for the custody of the children under section 26 (1). This decision shows plainly the absurdity of the majority decision in the Court of Appeal in the present case, because the children in *Bryant* v. *Bryant*[27] were the *same* children whether there had been a bigamous marriage or not, but it was *the fact* that there had been a bigamous marriage which enabled the court to make the order for custody!

As to the argument that may be put forward based on the doctrine of re-enactment, namely, that the enactment of section 26 (1) in 1950 in the same form as section 193 of the Act of 1925, must be treated as, in effect, a statutory declaration that the previous judicial interpretation of the relevant words in the subsection was the correct interpretation, it is submitted that the rule is by no means absolute, and that (1) it is only a rule of guidance; (2) it yields to the golden rule that where possible words must be construed according to their natural and ordinary meaning; (3) that the decisions on the statutory provision in question must be clear and unambiguous in order to bring the doctrine into operation at all: see *Barras* v. *Aberdeen Steam Trawling and Fishing Co. Ltd.*[28]; *Robinson Brothers (Brewers) Ltd.* v. *Durham County Assessment Committee*[29]; *Royal Crown Derby Porcelain Co. Ltd.* v. *Raymond Russell*[30]; *Lang* v. *Lang*.[31] It is to be noted that in 1925 when section 193 of the Judicature Act was enacted (the predecessor of section 26 (1)) *Langworthy* v. *Langworthy*[32] was the only decision on the statutory provision in question, but by 1950 there had been conflicting views put forward by the judiciary as to the correct interpretation of this provision. Further, there is little room for the application of the doctrine where the re-enacted section is contained in a consolidating Act. It is also submitted that where a statute is of a remedial nature conferring jurisdiction its provisions will be construed liberally: *Dapueto* v. *Wyllie & Co.*[33]

Finally, it is submitted that considerations of reasonableness and convenience demand that the construction contended for by the appellant should be placed on section 26 (1). The word "children" in the subsection must bear a single meaning, it cannot be limited to "legitimate children" for some purposes and extend to "illegitimate children" for other purposes. [Reference was also made to rule 54 (1) of the Matrimonial Causes Rules, 1950, and to *Regina* v. *Chadwick*.[34]]

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[26] 11 P.D. 85.
[27] [1955] P. 164.
[28] [1933] A.C. 402, 411, 446.
[29] [1938] A.C. 321, 340.
[30] [1949] 2 K.B. 417, 428, 429.
[31] [1955] A.C. 402, 431.
[32] 11 P.D. 85.
[33] (1874) L.R. 5 P.C. 482.

Gilbert Beyfus Q.C. and *J. P. Comyn* for the Queen's Proctor. An examination of the Matrimonial Causes Act, 1857, shows that the words in dispute (then contained in section 35 of that Act) were intended to deal with the case of those children whose legitimacy was put in question by reason of their parents' suit for dissolution of marriage. The whole tenor of authority since 1857, with the exception of the observations of Denning J. in *M.* v. *M.*,[35] is in favour of the construction for which the Queen's Proctor is contending, and the legislature in 1950 put its seal of authority upon it in approving by way of enacting section 26 (1) in substance unaltered in form from the corresponding provision in earlier statutes. In effect, therefore, it is section 35 of the Matrimonial Causes Act, 1857, which has to be construed in the present case. It is plain that in seeking to construe an Act of 1857, it is necessary to look at it through 1857 spectacles. It was this Act which instituted a court for divorce and matrimonial causes and abolished the jurisdiction in matters matrimonial then vested in the ecclesiastical courts. Section 35 was concerned with the position of infants after a decree of nullity of divorce had been pronounced. The effect of a decree of nullity is that a child who is apparently legitimate in the morning is illegitimate in the evening after the decree has been made. The section is a "double-barrelled" section in that it deals with judicial separation, nullity and divorce. The words in question, "the children the marriage of whose parents is the subject of "such suit," appear in section 35 and in no other section of the Act.

The question of construction is somewhat complicated by reason of the provisions of the Legitimacy Act, 1926. The question may be asked, why did the legislature in 1926 think fit to legitimize those children born before the marriage of their parents when the parents were free to marry but did not think fit to legitimize those children born before marriage when their parents were not free to marry? Obviously it was not to punish the children who came within the second category. The answer, it is submitted, lies in the fact that probably more than half the number of children coming within the second category would have been born in wedlock. It would have led to insuperable difficulties if the legislature had passed an Act which had the effect of legitimizing a child born to Mr. and Mrs. X at a time when Mrs. X was married to Mr. Y. It is submitted that section 35 of the Act of 1857 refers only to post-marriage and not to pre-marriage children.

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[34] (1847) 11 Q.B. 173.

[35] [1946] P. 31.

The ambiguous language of section 35 is probably due to the circumstance that the section is concerned with the quite different problems arising from a decree of nullity and a decree of divorce. The reason for making a distinction between a child born before the marriage in question in a nullity suit and a child born after the marriage is this: a child born after marriage is affected by the suit, whilst a child born before marriage is unaffected by the result of the suit. A child is "affected" in the sense that his or her status is changed. It is natural therefore to suppose that an Act of Parliament which empowered the court to affect the status of such children should give the same court powers as to custody in respect of such children. It is submitted that all the authorities support this view with the exception of the dictum of Denning J. in *M.* v. *M.*[36]

Prima facie the word "child" or "children" in a statute means "legitimate child" or "legitimate children": see *Regina* v. *Totley* (*Inhabitants*)[37] and also *In re Makein*,[38] which is an illustration of and reinforces that general principle. It is most improbable that in the year 1857 Parliament intended to put illegitimate and legitimate children in the same position under the provisions of section 35. Further, if it was the policy of the legislature to bring within the purview of a custody order children born before the marriage of their parents, one would have expected such a revolutionary change to be introduced in clear and unambiguous terms, and one would have expected to find the same clear language in all other sections of the Act which concerned children. The judgment of Morris L.J. in *Packer* v. *Packer*[39] is adopted in support of this contention.

It is worthy of note that by section 4 of the Law Reform (Miscellaneous Provisions) Act, 1949, Parliament did consider the question of illegitimate children and enacted that where a decree of nullity was granted in respect of a voidable marriage, any child who would have been the legitimate child of the parties to the marriage if it had been dissolved, instead of being

[36] [1946] P. 31.

[37] (1845) 7 Q.B. 596.

[38] [1955] Ch. 194.

[39] [1954] P. 15, 25.

annulled, on the date of the decree should be deemed to be their legitimate child notwithstanding the annulment.

Finally, it is submitted that it is impossible to suppose that in 1857 Parliament would have made such a revolutionary change in the law as is suggested on behalf of the appellant, by a single ambiguous phrase in a single section of the Act, when a perfectly plain explanation can be given as to the true meaning of the section. [Reference was also made to section 2 of the Law Reform (Miscellaneous Provisions) Act, 1934; and to *Harrison* v. *Harrison*.[40]]

Simon Q.C. in reply. It is necessary to give to the word "children" in section 26 (1) a meaning which includes "illegitimate children" because otherwise the reference to nullity proceedings in the subsection is meaningless. Section 35 of the Act of 1857 enacted a revolutionary change in the law, for the ecclesiastical courts had no jurisdiction to deal with the custody of legitimate children, and no court had any power concerning the custody of illegitimate children. [Reference was made to *Guardians of Northwich Union* v. *Guardians of St. Pancras Union*.[41]]

Their Lordships took time for consideration.

November 2, 1955. VISCOUNT SIMONDS (read by LORD COHEN). My Lords, this appeal raises the question what is the true construction of certain words in section 26 (1) of the Matrimonial Causes Act, 1950, upon which judicial opinion has differed in the Court of Appeal and will, I believe, differ in this House. The section to which I have referred reproduces, so far as its relevant words are concerned, section 35 of the Matrimonial Causes Act, 1857, and I think that it is important at the outset to emphasize this fact as there has been some disposition to ignore it. Mr. Simon, who argued this case for the appellant in a manner which left the House in his debt, conceded that these relevant words must be construed in the same sense today as in 1857.

This, then, briefly is the problem. The appellant, being then a widow, on August 17, 1950, gave birth to an illegitimate child of whom the respondent, then the husband of another woman, was the father. His marriage was dissolved, and in May, 1952, he married the appellant. On November 26, 1953, a decree of dissolution of marriage was granted to her on the ground of his adultery, but the learned commissioner refused her prayer for an order for custody of the illegitimate child, holding that he was bound by the decision of Barnard J. in *Harrison* v. *Harrison*.[1] From this refusal she appealed to the Court of Appeal, which by a majority (Jenkins and Hodson L.JJ., dissentiente Singleton L.J.) dismissed her appeal. Hence her appeal to this House.

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[40] [1951] P. 476, 481.

[41] (1888) 22 Q.B.D. 164.

My Lords, the jurisdiction of the Divorce Court to make an order for the custody of a child is now founded on section 26 of the Matrimonial Causes Act, 1950, which is in these terms: "(1) In any proceedings for divorce or nullity of marriage or "judicial separation, the court may from time to time, either "before or by or after the final decree, make such provision as "appears just with respect to the custody, maintenance and "education of the children the marriage of whose parents is "the subject of the proceedings, or, if it thinks fit, direct proper "proceedings to be taken for placing the children under the "protection of the court." The vital words, "the children "the marriage of whose parents is the subject of the proceedings," are derived by way of the Judicature (Consolidation) Act, 1925, from section 35 of the Matrimonial Causes Act, 1857, and the question which might have been asked at any time during the last 98 years is whether, in the phrase that I have cited, the word "children" includes illegitimate children. Today it must be answered and the answer cannot be different from that which would have been given in 1857. That does not mean that in regard to particular individuals the result may not be different, for a child who would have been illegitimate in 1857 may today, as the result of the Legitimacy Act, 1926, be a legitimate child. But that only means that, as the law does not stand still, the word "children," meaning thereby "legitimate children," will have a wider content. For this reason, though the House has been referred to a large number of statutes dealing with matrimonial causes from 1857 to the present day, I do not myself get any help from them except in one aspect to which I will presently refer. The question is, in my opinion, to be decided by an examination of the relevant words in the context of the statute in which they are found and the then prevailing general law.

First, as to the prevailing law. It was in 1857 (as it is today) a cardinal rule applicable to all written instruments, wills, deeds or Acts of Parliament that "child" prima facie means lawful child and "parent" lawful parent. The common law of

[1] [1951] P. 476; [1951] 2 T.L.R. 242; [1951] 2 All E.R. 346.

England did not contemplate illegitimacy and, shutting its eyes to the facts of life, described an illegitimate child as "filius "nullius." This prima facie meaning may in certain circumstances be displaced and a wider meaning given to the words, and it is said that those circumstances are present if the wider meaning is more consonant with the policy of the statute in which the words are found: see *per* Vaughan Williams L.J. in *Woolwich Union* v. *Fulham Union*.[2] This is not, I think, an entirely happy phrase, for it appears to suggest that the court begins its consideration of the statute with an impartial mind towards either meaning. It is, moreover, capable of leading and, I think, has led the court to find the policy of the Act in its own predilections of a later age rather than in the provisions of the Act itself.

A safer approach to the question of construction, and one that has the authority of this House, is to say that "children" means legitimate children unless some repugnancy or inconsistency and not merely some violation of a moral obligation or of a probable intention would result from so interpreting the word: see, for example, *per* Lord Selborne in *Dorin* v. *Dorin*.[3] Lord Selborne was there dealing with the use of the word "children" in a will, but the principle is the same. Examples of it could be multiplied. I will only refer to what Eve J. said in *In re Taylor*,[4] viz., that no other meaning than lawful child can be given to the word unless there is clear evidence in the will itself of an intention to establish another application of the word, and finally express my entire concurrence in the judgment of Harman J. in *In re Makein*.[5] I do not think that his examination of this branch of the law can be improved upon.

I turn now to the context of the Act and I do not find one word in it which suggests that illegitimate children were the concern of the legislature, unless it is to be found in the words under discussion: on the contrary, if they were, it would be remarkable that being provided for by section 35 they have not been provided for by other sections of the Act, as admittedly they have not. In effect, it appears to me that the argument, which found favour with Singleton L.J., that it is more consonant with the object of the statute to include illegitimate children in section 35 than to exclude them from it, is based not on any policy which is to be found in the statute as a whole but upon a conviction that the legislature ought to have provided for illegitimate children and the consequent attribution of the wider but unnatural meaning to that word.

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[2] [1906] 2 K.B. 240; 22 T.L.R. 579.

[3] (1875) L.R. 7 H.L. 568, 577.

[4] [1925] Ch. 739.

[5] [1955] Ch. 194; [1955] 1 All E.R. 57.

It is, I think, permissible to question this attitude and to ask whether the argument that illegitimate children are as much in need of custody, education and maintenance as legitimate children ought to be assumed to have had or to have any weight with the legislature in this connexion. I can see no ground whatever for saying that it ought. It is important not to confuse the issue by the fact that the category of legitimate children has been enlarged by the Act of 1926: for that means only that legitimated children become children within the meaning of the Act of 1857 and its successors as well as of many other Acts. It does not mean that there was or is any disposition for the legislature, when dealing with matrimonial causes, to treat legitimate and illegitimate children alike. When, indeed, it is remembered how different even today is the measure meted out to them it is, in my opinion, extravagant to suppose that they would be subject without distinction to a single provision. Let me remind your Lordships that the putative father of an illegitimate child had no rights whatever in regard to it: nor—and this is of great importance—had he, as between himself and the mother, any obligations or liabilities in respect of it, unless she, within a short period of time and by evidence that required corroboration, established that he was the father and obtained an order against him. Is all this to be changed? Is the mother to have less than her former rights to the custody of her natural child? Is the man whom she has married and alleges to be its father to be subject to new liabilities? Is he, when the years have passed and he has by his generous treatment of the mother's illegitimate child as his own lent colour to the allegation of his paternity, to be the victim of claims which he cannot then disprove?

For my part, my Lords, as I reflect upon this matter, I am ever more strongly persuaded that it can only be by the most imperative demand of the language used that illegitimate children can be brought within the section. I hope I am not wanting in respect to the contrary argument if I say that it appears to amount to the bare assertion that the word "children" in section 35 includes illegitimate children, therefore it is the policy of the Act to provide for illegitimate children.

I have perhaps dealt at too great length with the context in which the words that we have to construe are found. I recognize that the force of the appellant's argument lies in the words themselves, but I am anxious that the question that is asked should be properly framed. In my opinion, the question is whether the use of the word "children" in the phrase "the children "the marriage of whose parents" can be satisfactorily explained otherwise than by giving it the meaning "legitimate or "illegitimate." The strength of the argument in favour of this meaning is that, since the jurisdiction covers cases of nullity as well as of divorce, the children in respect of whom an order for custody may be made must include children of a marriage which has been annulled and must therefore include some children who are illegitimate. If then, so runs the argument, some children who are illegitimate are included, by what method can any illegitimate children be excluded? My Lords, I find this an unsatisfactory and unconvincing argument. Section 35 of the 1857 Act dealt with three different kinds of proceeding, for divorce, for nullity and for restitution of conjugal rights. In any of the three cases there might be children of the union for whose custody, maintenance and education it would be proper to provide, and it appears to me that in this fact ample justification is to be found for the use of a phrase which is not found elsewhere in the statute. I might test it in this way. Suppose that the draftsman wishes to provide for the children of a marriage which it is sought to annul. If, following the language commonly used in the Act, he speaks of children of the marriage, the doubt will at once arise whether these can be children of a marriage which, being annulled, is no marriage. He therefore uses words which, I think, cannot be bettered to cover the children of an annulled marriage. Even so, it was urged in *Langworthy* v. *Langworthy*[6] that the child of an invalid marriage which was annulled was not a child of the marriage of its parents, but the significant reply was made by Cotton L.J.[7] that section 35 includes sentences of nullity of marriage and must therefore be considered as enacting that in cases where there is no valid marriage the children of the union may be provided for. The learned Lord Justice did not say, as was said 70 years later, that the legislature had now made parenthood not legitimacy the test of jurisdiction, but was careful to explain, and, as I think, at the same time to limit, the meaning of the phrase. In the same way Fry L.J. said[8] that it had been suggested that the child, being the offspring of a void marriage,

[6] (1886) 11 P.D. 85; 2 T.L.R. 373.

[7] 11 P.D. 88, 89.

[8] Ibid. 89.

was not within the section, but for the reason given by Cotton L.J. he was of opinion that he was. It has been urged that to enlarge the meaning of child so far and no further is not justifiable, and that to do so involves a rewriting of the section. I do not think so. The section is dealing with a marriage of which children have been born: it does not look behind it. It is a natural and proper use of language to speak of the children of that union as children the marriage of whose parents is the subject of such suit even though the result of the suit is to annul the marriage. They are the children who are affected by the result of the suit, as other illegitimate children are not, and it is proper that the court having by its decree affected their status should be empowered to provide for them. Children born before the marriage which is the subject of the suit, whose paternity may well be in dispute, are in a different category from those whose parentage is notorious until the marriage is annulled, and who but for the suit would forever remain children the marriage of whose parents was the subject of the suit. It appears to me that without repugnancy or inconsistency the meaning of the relevant phrase can be confined to these children and, if it can be so confined, according to the proper canon of construction it should be.

My Lords, I have tried to interpret this section without reference to authority, and I concede that your Lordships are at liberty to give to these words a meaning which in their hundred years of life they have not yet borne. Yet it may be right to pause before you do so. It is, no doubt, true that during the first 50 years of its existence the cases in which section 35 might have been invoked were but a trickle compared with the flood that followed after. But, whether there was a trickle or a flood, there is no record of this contention being raised except in an argument of the Attorney-General in 1929 (see *Green* v. *Green*[9]) which was not even noticed in the reserved judgment of the President, Lord Merrivale, until in *M.* v. *M.*[10] it was decided by Denning J. that under section 193 of the Act of 1925 (the successor of section 35) the test of jurisdiction was "parent-"hood, not legitimacy." The reported cases in which the contention might have been raised are numerous: most of them are referred to in the judgment of Jenkins L.J. I cannot even conjecture the number of unreported cases. Yet to generations of lawyers on the Bench and at the Bar, learned in this branch of the law, it did not occur that the words had the meaning now attributed to them, a fact the more strange if, indeed, it is a meaning more consonant with the policy of an Act with which nobody could be more familiar than they.

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[9] [1929] P. 101; 45 T.L.R. 7.

[10] [1946] P. 31; 62 T.L.R. 16; [1945] 2 All E.R. 525.

In this connexion I do not think that your Lordships can disregard the course of legislation. The relevant words of section 35 of the Act of 1857 have been repeated once and again, and are now found in the Act of 1950. At that later date the accepted view of the scope of the jurisdiction of the Divorce Court was as I have described. It is true that *M.* v. *M.*[11] had been decided in 1946, but in *Colquitt* v. *Colquitt*[12] a Divisional Court consisting of Lord Merriman and Jones J. had said[13]: "But in relation to proceedings for divorce, at any rate, we think "that to say that parenthood, not legitimacy, is the test, goes "too far. It cannot, in our opinion, be suggested that although "the parenthood is undisputed, an illegitimate child who cannot "be legitimated is the subject of custody proceedings under "section 193, on the divorce of the spouses who are, in fact, his "parents." No doubt the court went too far, for the suggestion had been made in 1946 and it has been made since. Yet the view of the court clearly represented the climate of opinion, and it might fairly be attributed to the legislature in 1950 that it did not intend by a repetition of the same words to give them a different meaning. This view is clearly expressed in *Harrison* v. *Harrison*[14] by Barnard J., himself a very experienced judge in this jurisdiction, and is reinforced by his reference to the numerous statutes in modern times in which the legislature has specifically defined child to include illegitimate child where that has been its intention.

For these reasons, my Lords, this appeal should be dismissed, and if what I think was justly called by counsel for the Queen's Proctor a revolutionary change is to be made in the law it should be made by the legislature by such plain words as in modern times it has been accustomed to use when it has intended to confer advantages or impose obligations in respect of children whether legitimate or illegitimate.

LORD OAKSEY (read by LORD RADCLIFFE). My Lords, the question in this case is whether, upon its true construction, section 26 (1) of the Matrimonial Causes Act, 1950, confers upon the court jurisdiction to make provision with respect to the custody, maintenance and education of illegitimate children of parents whose marriage is the subject of proceedings for divorce or nullity of marriage or judicial separation. That section re-enacts the words of section 35 of the Matrimonial Causes Act, 1857, but it is said that even if section 35 of the Act of 1857 did, upon its true construction, confer such jurisdiction, that construction cannot be put upon section 26 (1) of the Act of 1950 owing to the cases which had been decided between 1857 and 1950.

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[11] [1946] P. 31.

[12] [1948] P. 19; 63 T.L.R. 358; [1947] 2 All E.R. 50.

[13] [1948] P. 19, 24.

[14] [1951] P. 476.

It is convenient, I think, to consider first what is the true construction of the original section, section 35 of the Act of 1857. It is important, in my opinion, to observe that the section had nothing to do with legitimation or status but provided only for custody, maintenance and education. It is true that the word " children " has acquired the prima facie meaning of legitimate children in statutes, wills and deeds, because it has been considered that the legislature, testators and settlors usually intend, in using the simple word " children," to refer to legitimate children. But circumstances can displace this rule (cf. *Wilkinson* v. *Adam* [15]). As Vaughan Williams L.J. said in *Woolwich Union* v. *Fulham Union* [16]: " It is of course true that " that is only prima facie the meaning to be given to the word " (children) " and that a wider meaning may, in the case of some " statutes, be given to it, so as to include an illegitimate child " or illegitimate children, where that meaning is more consonant " with the object of the statute."

In my opinion, it is more consonant with the object of the Act of 1857 that jurisdiction over the custody and maintenance of illegitimate children as well as legitimate children should be conferred upon the Divorce Court in all the proceedings referred to in the section. I can conceive of no reason why, when the marriage of their parents is being dissolved or annulled or their parents are being judicially separated, the custody of illegitimate children should not be dealt with in the same proceedings or why the cost of their maintenance should not be laid upon the spouse who is to blame. That there is an obligation on the Crown as parens patriae to deal with their custody is not in question.

Apart, however, from these considerations, it is admitted that illegitimate children are included in the word " children " used in section 35, but it is said that the word refers only to that

[15] (1812) 1 Ves. & B. 422.

[16] [1906] 2 K.B. 240, 246.

class of illegitimate children whose illegitimacy is declared in the suit or proceedings.

In my opinion, this is not the meaning of the words used. The child in question in the present case is the child of the parents whose marriage was the subject of the proceedings. He is not the child of the marriage but he is the child of the parents whose marriage is the subject of the proceedings. Not only do the words used accurately describe him, but they are used in contradistinction to the words "children of the marriage" which occur elsewhere in the Act.

Turning to the construction of section 26 (1) of the Act of 1950, it is not, I think, necessary for me to review all the cases which have been so carefully reviewed by Jenkins L.J. in the Court of Appeal. It does not appear to me that the construction of the word "children" adopted by the Court of Appeal had been put upon the words of the section so clearly that the section, when re-enacted as section 26 in the Statute of 1950, must be given that interpretation in accordance with the principle stated in the case of *Barras* v. *Aberdeen Steam Trawling and Fishing Co.*[17]

For these reasons I agree with the judgment of Denning L.J. in *M.* v. *M.*[18] and *Packer* v. *Packer*[19] and the judgment of Singleton L.J. in the present case, and I therefore move your Lordships that this appeal should be allowed.

LORD RADCLIFFE. My Lords, I think that this appeal ought to succeed. It turns upon a short point. If a man and a woman have a child before they are married and in circumstances which preclude its legitimation under the Legitimacy Act, 1926, can the court which dissolves their marriage make "such provision as "appears just with respect to the custody, maintenance and "education" of the child under section 26 (1) of the Matrimonial Causes Act, 1950?

The power to make such an order under the section covers "children the marriage of whose parents is the subject of the "proceedings"; and the view which has hitherto prevailed in this case is that this power does not extend to an illegitimate child, except a child whose illegitimacy arises from the nullity of a marriage which is the current subject of court proceedings.

The reason for the admission of this "class" of illegitimate children to the benefit of the section is that the section includes

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[17] [1933] A.C. 402; 49 T.L.R. 391.

[18] [1946] P. 31.

[19] [1954] P. 15; [1953] 2 All E.R. 127.

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proceedings for nullity of marriage among the occasions upon which an order in respect of children can be made, and it was realized as long ago as 1886 in *Langworthy* v. *Langworthy*[20] that section 35 of the Matrimonial Causes Act, 1857, the predecessor of our present subsection, must of necessity extend to the children of parents whose marriage was subjected to a decree of nullity, even though in those circumstances such children could not be described as anything but illegitimate.

The foundation of the case for the respondent rests in the principle that in the construction of an Act of Parliament words such as " child " or " children " are to be understood prima facie as referring to a legitimate child or legitimate children only. The rule is a rule of construction and no one suggests, of course, that it is absolute in its requirements. Various phrases have been used to define the conditions under which this prima facie meaning is displaced. For instance, in *Woolwich Union* v. *Fulham Union*[21] Vaughan Williams L.J. said: " It is of course " true that that is only prima facie the meaning to be given to " the word, and that a wider meaning may, in the case of some " statutes, be given to it, so as to include an illegitimate child " or illegitimate children, where that meaning is more consonant " with the object of the statute." I take leave to doubt whether the test which meaning is " more consonant " with the object of the statute is in all respects a satisfactory guide to decision, for I think it a very vague one: but, on the other hand, it seems to me uncontroversial to say that the prima facie meaning will be displaced if the context in which the word " child " appears evidently requires it to embrace a wider category than that of legitimate children. And that is the case here.

The subsection in question confers a power on the court the exercise of which is regarded indifferently as likely to be called for in proceedings for divorce, nullity or judicial separation. The power is to make orders regulating the care of children the marriage of whose parents is the subject of any such proceedings. There is only the one word " children " in the subsection. Either its meaning is confined to legitimate children or it is not. It cannot be said that it is so confined, since the *Langworthy*[22] decision showed long ago that it must include illegitimate children the marriage of whose parents is not in law a marriage for any of the various causes which make void an ostensible marriage. Where I differ from the Court of Appeal and from some of your Lordships is in thinking that, if the rule as to the prima facie meaning of "children" is displaced in this subsection, it is displaced for good, and that it cannot be allowed to come back, as it were, for a second bite by confining the illegitimate children contemplated to those born after an ostensible but void ceremony of marriage. Such a method of construction appears to me to be equivalent to rewriting the section rather than to construing it. Indeed, it seems to me to treat what is after all only a rule of construction as if it were more truly a rule of policy. In other words, I do not think that it is a right application of the rule of construction to read the word as extending to illegitimate children, but only to as few of them as possible.

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[20] 11 P.D. 85.

[21] [1906] 2 K.B. 240, 246.

[22] 11 P.D. 85.

For my part, I do not feel disposed to make such a restriction in this case. Once it is granted that in section 35 of the Act of 1857 the legislature was plainly contemplating that illegitimacy was not to exclude at any rate some such children from the court's protection, I cannot see any distinction of policy which would separate the children born of a void marriage, a nullity which may be due to formal invalidity, insanity, bigamy, consanguinity and other causes, from the children born without pretence of marriage. In all these cases in which it can be affirmed of a child that he is the child of two identified persons, though not born in wedlock, it seems to me that the court's order which dissolves, cancels or separates their union—and that is the situation envisaged—raises the same problem with regard to the child and recognizes in him the same need. In whatever circumstances it came to be formed in the first place, the union of the only two persons to whom he has a right to look for care and upbringing is to be broken: and the court which has charged itself with the duty of decreeing the break is required to allocate as between the two parties future responsibility for the custody, maintenance and education of the child. It seems to me by no means desirable to distinguish between the different causes of illegitimacy, when a power of this kind is in question, unless the statute granting the power clearly requires that we should do so: and for the reasons which I have given I do not think that the statute does make any such demand.

We were pressed, very naturally, with the argument that a decision in favour of the appeal would involve a departure from what was described by Jenkins L.J. in the Court of Appeal as the "received interpretation of section 26 (1) and its predecessors "over so long a period." The argument on these lines takes a variety of forms: in one form it stresses what has actually been said by eminent judges of the past in the course of decisions which relate to the point, in another it relies on the fact that in all the period since 1857 no decision in favour of the appellant's claim has ever been recorded, while on only a few occasions does it appear to have been presented to the court. Finally, it is said that the judicial interpretation of the relevant words of the subsection was so clearly established by 1950 that the enactment of section 26 (1) in the same form must be treated as, in effect, a statutory declaration that the established interpretation was the correct one. I must confess that I do not lend a sympathetic ear to this last and almost mystical method of discovering the law, least of all when it depends upon a consolidating Act the function of which is to repeat, but not to amend, existing statute law. But however that may be, the argument, whatever form it takes, depends for its force upon the demonstration that there has been an authoritative judicial interpretation over a period from which your Lordships ought not now to depart. This is a large claim to make in a case where it is not suggested that there has been any previous decision of this House on the matter, and in a case when it is sought not to deny a jurisdiction hitherto asserted but to assert a jurisdiction not hitherto exercised. In my opinion the demonstration fails.

I think that the analysis of existing authority stands this way. The actual question before us was never decided until 1951, when in *Harrison* v. *Harrison* [23] Barnard J. held that an illegitimate (but not legitimated) child of persons who married after its birth was not within section 26 (1) of the Act of 1950. *Webb* v. *Webb* [24] followed this judgment. The decision of the Court of Appeal in *Packer* v. *Packer* [25] is to the same effect, but only because the two Lords Justices who heard the appeal differed in their views, and, therefore, the decision of the Special Commissioner, who had followed *Harrison* v. *Harrison*,[26] remained in force. If this were all, it is obvious that there could not be said to be any current of authority which would impede your Lordships' free consideration of the matter: all the less so because in *M.* v. *M.*[27] Denning J. had already expressed the contrary view of the range of the subsection (then section 193 (1) of the Supreme Court of Judicature (Consolidation) Act, 1925), which

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[23] [1951] P. 476.

[24] [1952] W.N. 102; [1952] 1 T.L.R. 453; [1952] 1 All E.R. 527.

[25] [1954] P. 15.

[26] [1951] P. 476.

[27] [1946] P. 31.

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view is expressed by the phrase "the test is parenthood, not "legitimacy."

What further judicial observations there are on the point have come by a side wind, either by inference from what was not decided but might have been decided, or by expressions of opinion not essential to what was actually being decided. Nevertheless, their existence constitutes a formidable criticism of the validity of the appellant's argument. In effect, four cases are concerned —*Bednall* v. *Bednall*,[28] *Green* v. *Green*,[29] *Jones* v. *Jones*,[30] and *Colquitt* v. *Colquitt*.[31] In all these cases the point presented for the court's decision was whether a child for whom it was claimed that he had been legitimated by his parents' subsequent marriage could be made the subject of a custody order under the Supreme Court of Judicature (Consolidation) Act, 1925, in divorce proceedings to which the child was not a party and without a formal declaration of legitimacy. The first three of these cases decided that in such circumstances no order could be made: the fourth overruled them and decided that it could. It is one of the complications of this part of the case that the first three authorities are no longer good law on the point which they actually decided. But this much, at any rate, is clear, that the point itself need never have been debated at all if the power in question extends to cover illegitimate children as well as legitimated and legitimate children of divorced parents. How much weight, then, ought we to give to this set of cases?

I do not think that *Bednall* v. *Bednall* [32] is of any weight. The petitioner's application for custody was rested entirely on the child's legitimation, and the judge considered nothing except the procedural point how legitimation was to be recognized judicially. Indeed, it does not appear that the actual wording of the custody section was ever brought to his attention. *Green* v. *Green* [33] is a different matter. The King's Proctor was brought in to argue the case for the custody order, he did refer to the words of the section, and he pointed out that the power was not on the face of it "confined to the case of children that are legitimate." Lord Merrivale, in giving his decision, adopted the reasoning of *Bednall* v. *Bednall*,[34] though he found another way of giving directions for the custody of the child; but he also said with reference to the custody power in section 193 of the 1925 Act [35]:

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[28] [1927] P. 225; 43 T.L.R. 599.

[29] [1929] P. 101.

[30] (1929) 45 T.L.R. 292.

[31] [1948] P. 19.

[32] [1927] P. 225.

[33] [1929] P. 101.

[34] [1927] P. 225.

[35] [1929] P. 101, 104.

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"'Children' in these enactments means legitimate children in "the sense that at the time of the suit they are legitimate." This is a clear expression of opinion, but, unfortunately, it is not a reasoned one; and, if it is intended to take account of the decision in *Langworthy* v. *Langworthy*,[36] as I think that it is, I do not quite see how the children of a void marriage are anything but illegitimate, although recent legislation has enabled the children of voidable marriages to be treated otherwise. I pass over *Jones* v. *Jones*,[37] which merely followed the two earlier cases.

Colquitt v. *Colquitt* [38] was decided by a Divisional Court (Lord Merriman P. and Jones J.) in 1947. Its effect was to disapprove of *Bednall* v. *Bednall*,[39] *Green* v. *Green*,[40] *Jones* v. *Jones*,[41] as decisions and, consequently, to uphold the contrary decision of Denning J. in *M.* v. *M.*,[42] which had been given in 1946. But in upholding the decision of Denning J., the Divisional Court did not agree with what may fairly be said to have been the whole basis of his reasoning. After referring to *Langworthy* v. *Langworthy*,[43] they say [44]: "But in relation to proceedings for "divorce, at any rate, we think that to say that parenthood, "not legitimacy, is the test, goes too far. It cannot, in our "opinion, be suggested that although the parenthood is undisputed, an illegitimate child who cannot be legitimated is the "subject of custody proceedings under section 193, on the "divorce of the spouses who are, in fact, his parents. But we "agree with Denning J., that the fact that the wording of "section 193 is wide enough to cover the case of a child of "the union rendered illegitimate by the annulment of the marriage of his parents, tends to support the view that in divorce "proceedings it is also wide enough to include a child who has "been rendered legitimate."

My Lords, this is the other expression of opinion that must be taken account of. Again, no reasons are given for it, and I am left at large to speculate why the Divisional Court thought that something could not be suggested which had quite explicitly been not only suggested but avowed in the very judgment of the Probate Division, *M.* v. *M.*,[45] which they were upholding as against the other decisions. The words "parenthood, not

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[36] 11 P.D. 85.
[37] 45 T.L.R. 292.
[38] [1948] P. 19.
[39] [1927] P. 225.
[40] [1929] P. 101.
[41] 45 T.L.R. 292.
[42] [1946] P. 31.
[43] 11 P.D. 85.
[44] [1948] P. 19, 24.
[45] [1946] P. 31.

" legitimacy is the test " are intended to convey just that suggestion. When one has said, with all sincerity, that one should pause long before adopting a construction of the Act which clearly did not commend itself to such authorities as Lord Merrivale and Lord Merriman and which, it may be supposed, has not presented itself as plausible to several experienced Divorce Court practitioners, the question still remains whether, now that it is for the first time before your Lordships' House, an opinion which you might otherwise have favoured should be put aside in deference to the fact that the law has already been clearly and firmly established in the cases to which I have referred. I can only say that, in my view, the law is very far from having settled into anything that can be called a clear course of decision. I agree that the appeal should be allowed.

LORD TUCKER. My Lords, the decision of this appeal turns upon the proper construction of section 26 (1) of the Matrimonial Causes Act, 1950. [His Lordship read the subsection and continued:] This section reproduced, without any material alteration, section 35 of the Matrimonial Causes Act, 1857, which, for the first time, entrusted to the court questions of custody in divorce proceedings.

The question is whether the jurisdiction of the court over the children of the parties to proceedings relating to divorce, nullity and judicial separation extends to a child born to those parties before the marriage which is the subject of the proceedings and not subsequently legitimized.

My Lords, I do not think it necessary to refer to the authorities which establish beyond question that prima facie the words " child " or " children " in an Act of Parliament mean a legitimate child or legitimate children, and that illegitimate children can only be included by express words or necessary implication from the context.

Section 26 does not use the words " children of the marriage " which appear in other sections of the Act, so that it is, at any rate, plain that they have been used for the purpose of including some children who could not be described as children of the marriage, and *Langworthy* v. *Langworthy*[46] is an instance of a case where the latter phrase would have been inappropriate, and the section was accordingly construed as giving the court power over the custody of a child that was illegitimate by reason of the invalidity of the marriage of its parents. But the wider words

[46] 11 P.D. 85.

"children the marriage of whose parents is the subject of the "proceedings" are not used exclusively with reference to nullity proceedings, they refer also to proceedings for divorce and judicial separation, and I find difficulty in understanding by what principle of construction they can be given a more restricted meaning in the latter context, with the result that in one case the legislature is including in the word "children" illegitimate children, and in the other two cases the same word is to be construed as excluding children who come strictly within the language used solely because any other construction would result in the inclusion of illegitimate children in cases 2 and 3 as well as in case 1.

It is said that this section must be looked at "through 1857 "spectacles," and that at that date Parliament was not disposed to concern itself over much with the interests or welfare of illegitimate children, so that they cannot have been intended to be included as fit subjects for custody orders. I agree that 1857 is the crucial date, but by 1887 it had become manifest from *Langworthy's* case [46] that, notwithstanding its presumed attitude towards illegitimacy, the legislature in 1857 had, in fact, by this section made provision for illegitimate children. Moreover, I am not persuaded that the view with regard to illegitimacy attributed to Parliament in 1857 is a sufficient ground for not construing the section strictly in accordance with its language. Purely as a matter of construction it would seem to me that Parliament, having deliberately chosen a form of words which can only have one meaning with reference to one class of proceeding, and having used the same words with reference to two other classes in a section which is prefaced with the words "in any "proceedings," these words must necessarily bear the same meaning throughout. I agree with the view expressed by Denning L.J. in *Packer* v. *Packer*,[47] that any other construction requires the section to be rewritten, and that by the language adopted the test of parenthood has been substituted for legitimacy. I find difficulty in accepting the view which is, I think, implicit in the judgment of Morris L.J. in that case, that in the case of void marriages the power to award custody is limited to children born as a result of the void "marriage" (using the word in inverted commas). I can see no reason why it should not, in the case of bigamy, for instance, include children born before the bigamous marriage. This necessarily follows if the test in that case is, as I think it must be, parenthood rather than legitimacy.

[46] 11 P.D. 85.

[47] [1954] P. 15.

There does not seem to me to be room for any test other than parenthood or legitimacy. The same test must, I feel, be applied in each case, and the inclusion of nullity in the proceedings referred to is decisive in favour of parenthood.

My Lords, I have endeavoured to express my views on the construction of the section, but I would be disposed to accept a different construction if there existed a considerable body of authority—although not binding on this House—which had been acted on for many years, and which must be assumed to have been in the mind of Parliament on the occasions when section 35 of the Act of 1857 has been amended or re-enacted. I do not, however, find that the precise point has ever been the subject of express decision until *Harrison* v. *Harrison*,[48] although I agree that the reasoning of many of the cases cited points to the construction which has been accepted by the majority of the Court of Appeal in the present case. In *Green* v. *Green*[49] the Attorney-General, appearing on behalf of the King's Proctor, advanced the argument now relied upon by the appellant, and the judgment in that case, which proceeded on a different ground and was subsequently overruled, necessarily involved its rejection though it was not in terms mentioned. It was also referred to with disfavour in *Colquitt* v. *Colquitt*,[50] which overruled *Green* v. *Green*.[51] It is, I think, worthy of notice that over a long period of years the effect of the decision in *Langworthy* v. *Langworthy*[52] does not appear to have been fully appreciated. For example, rule 54 (1) of the Matrimonial Causes Rules, 1950, which dates from rule 104 of the 1865 Rules, has never been altered so as to take cognizance of that decision. The existence of this rule unaltered for so long may well have consciously or unconsciously influenced the views of practitioners and others with regard to the scope of section 35 of the Act of 1857.

My Lords, I cannot find in the history of this matter sufficient grounds for inferring that in 1950 Parliament placed the seal of its approval on a previously accepted construction of this section.

The arguments on each side have been already fully canvassed in the judgments of the Court of Appeal in the present case, and in *Packer* v. *Packer*,[53] and I am conscious that I have added little, if anything, to what has already been said, but as this question has given rise to difference of judicial opinion in the Court of Appeal on each occasion and again in your Lordships'

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[48] [1951] P. 476.
[49] [1929] P. 101.
[50] [1948] P. 19.
[51] [1929] P. 101.
[52] 11 P.D. 85.
[53] [1954] P. 15.

House, I have felt bound to express my opinion in my own words rather than to content myself with saying that I prefer the construction accepted by Singleton L.J. in the present case, and Denning L.J. in *Packer* v. *Packer*[53] to that which has found favour with Jenkins, Hodson and Morris L.JJ.

I have not referred to the question of convenience, because, in my view, this has little, if any, bearing on questions of construction, but where I find a strict construction results in enabling the court to do that which justice clearly requires in the interest of an infant child, I am the less inclined to reject a literal interpretation by attributing a lack of enlightenment to Parliament in 1857. I would allow the appeal.

LORD COHEN. My Lords, it is not contended that the expression "the children the marriage of whose parents is the subject "of the proceedings" in section 26 (1) of the Matrimonial Causes Act, 1950, is synonymous with the expression "children of the "marriage" and is therefore confined to legitimate children. The dispute is as to whether the illegitimate children who fall within the ambit of the expression include all the fruit of the intercourse between the petitioner and the respondent or are confined to those born between the date of the ceremony of marriage which gave rise to the proceedings and the date of the decree.

The arguments in support of the rival contentions have been summarized by Jenkins L.J. in his judgment in the Court of Appeal, and I agree with him in finding the arguments against the appeal more cogent than those adduced in support of it. Had it not been that the majority of your Lordships have reached a different conclusion, I should have been content to say no more, but in the circumstances I must state as shortly as I can my reasons for my opinion.

Section 26 (1) of the Matrimonial Causes Act, 1950, reproduces, without material alteration, section 193 of the Supreme Court of Judicature Act, 1925, as amended by section 10 (4) of the Matrimonial Act, 1937, and section 193 re-enacted, without material alteration, the combined provisions of section 35 of the Matrimonial Causes Act, 1857, and section 4 of the Matrimonial Causes Act, 1859. I think, therefore, the proper approach to the question is to seek the meaning of section 35 of the Act of 1857.

The preamble to that Act states its purpose: to constitute a court with exclusive jurisdiction in matters matrimonial and with authority in certain cases to decree the dissolution of a marriage.

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[53] [1954] P. 15.

The operative provisions of the Act make it clear that the court is to have jurisdiction to declare a marriage null as well as to dissolve it. The Act contains no reference to children until section 33, which, inter alia, empowers the court to direct that the whole or any part of the damages recovered from an adulterer shall be settled for the benefit of the children (if any) of the marriage. This section only applies to suits for dissolution of marriage or for judicial separation, and it is admitted that the expression " children of the marriage " comprises only legitimate children. I need not set out section 35 in full as its effect has already been stated by your Lordships, but I would observe in passing that it applies not only in suits for judicial separation or dissolution of the marriage but also to suits for a decree of nullity of the marriage.

The only other reference to children is in section 45, which empowers the court, if it pronounces a sentence of divorce or judicial separation because of the adultery of a wife, to order such settlement as it thinks reasonable to be made of the wife's property or any part thereof for the benefit, inter alia, of the children of the marriage. Here again it is admitted that the expression " children of the marriage " comprises only legitimate children. It follows that prior to the passing of the Legitimacy Act, 1926, the expression " children of the marriage " in this section, as in section 33 or in the corresponding sections of the Supreme Court of Judicature Act, 1925, would not include illegitimate children born to the parties to the proceedings before the celebration of the marriage the subject of the proceedings.

Returning to section 35, the substitution of the phrase " children the marriage of whose parents is the subject of such " suit or other proceeding " for the phrase " the children of the " marriage " is, as appears from the judgments of Cotton L.J. and Fry L.J. in *Langworthy* v. *Langworthy*,[54] explained by the fact that the section includes sentences of nullity of marriage. It must, therefore, as Cotton L.J. said, " be considered as enacting " that in cases where there is no valid marriage the children of " the union may be provided for." It was argued before us that this ratio decidendi was expressed in terms wide enough to include children born to the parties before the date of the ceremony of marriage which gave rise to the suit, but there is nothing in the report of the arguments or the judgments which suggests that the mind of the court was directed to any such wider topic. Bearing in mind the purpose of the Act as expressed in the preamble, and the fact that except where references to decrees of nullity make it necessary to depart from the phrase "children "of the marriage," that expression is used and the powers of the court in respect of children are thus limited to legitimate children, I find it impossible to hold that by the change of expression in section 35 the legislature did more than enable the court in the case of suits for nullity to make similar provision for children born between the date of the ceremony of the marriage which was the subject-matter of the suit and the date of the decree to that which the court could make for legitimate children in suits for dissolution of marriage or judicial separation.

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[54] 11 P.D. 85. 88, 89

I see nothing in the subsequent legislation to lead me to think that a different construction should be placed on section 26 (1) of the Matrimonial Causes Act, 1950, and the preponderance of judicial decision supports the conclusion I have reached.

Dealing first with subsequent legislation, I need only refer to the following sections on which some reliance was placed by counsel for the appellant. Section 5 of the Matrimonial Causes Act, 1859, gave power to the court, after a final decree of nullity of marriage or dissolution of marriage, to make such orders with reference to the application of the whole or a portion of the property settled by ante-nuptial or post-nuptial settlements either for the benefit of "the children of the marriage or of their "respective parents as to the court shall seem fit." The substance of this section as amended in an immaterial particular is reproduced in section 25 of the Matrimonial Causes Act, 1950. It may well be, though it is not necessary in this appeal to decide the point, that the reference to "decree of nullity" in the section makes it necessary to enlarge the meaning to be given to the expression "children of the marriage" so as to include illegitimate children born to the parties between the date of the marriage ceremony and the date of decree, but it does not make it necessary to include children born before the date of the marriage ceremony. Indeed, the use of the phrase "children "of the marriage" in relation both to divorce and to nullity seems to me inconsistent with the wide interpretation which the appellant seeks to place on the phrase.

Section 6 of the Matrimonial Causes Act, 1884, enabled the court "at any time before final decree on any application for "restitution of conjugal rights, or after final decree if the respon-"dent shall fail to comply therewith, upon application for that "purpose" to "make . . . such orders . . . with respect to the "custody, maintenance, and education of the children of the "petitioner and respondent as might have been made by interim "orders during the pendency of a trial for judicial separation "between the same parties." This section is reproduced in section 26 (2) of the 1950 Act. It was argued that the change of phrase from "children of the marriage" was made with the deliberate intention of bringing in illegitimate children. I am unable to accept this argument. I agree with the respondent's counsel that the provisions of this subsection are at least equally consistent with the view that the expression "the children of the "petitioner and respondent" means in its context legitimate children and none other.

I turn now to judicial authority. I have already dealt with *Langworthy* v. *Langworthy*.[55] The only other decision prior to the passing of the Legitimacy Act, 1926, to which your Lordships' decision was directed was *Jackson* v. *Jackson*.[56] That decision was consistent with *Langworthy* v. *Langworthy*[57] but throws no further light on the matter. After the passing of the Legitimacy Act, 1926, a series of cases came before the courts in which the question was whether the court, exercising its divorce jurisdiction, could make an order for custody of a child legitimated per subsequens matrimonium before a declaration of legitimacy had been made under that Act. In *Bednall* v. *Bednall*,[58] *Green* v. *Green*,[59] and *Jones* v. *Jones*[60] it was held that the court could not do so. These decisions have since been disapproved, but *Green* v. *Green*[61] is instructive for present purposes because in that case the Attorney-General, appearing for the King's Proctor, argued that the power conferred by section 35 of the Act of 1857 was not confined to the case of children who are legitimate. No express reference was made to this argument in the judgment of Lord Merrivale P., but it must, I think, be taken to have been rejected by him.

In *M.* v. *M.*[62] Denning J. refused to follow *Bednall* v. *Bednall*,[63] *Green* v. *Green*,[64] and *Jones* v. *Jones*.[65] He based his decision on two grounds—(a) that under section 193 jurisdiction rests on paternity, not legitimacy; and (b) "the established "principle that a child can be found to be legitimate without "the necessity of a decree of legitimacy."

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[55] 11 P.D. 85.
[56] [1909] P. 308.
[57] 11 P.D. 85.
[58] [1927] P. 225.
[59] [1929] P. 101.
[60] 45 T.L.R. 292.
[61] [1929] P. 101.
[62] [1946] P. 31.
[63] [1927] P. 225.
[64] [1929] P. 101.
[65] 45 T.L.R. 292.

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I have already given my reasons for not accepting the first ground. The second ground was approved by a Divisional Court in *Colquitt* v. *Colquitt*.[66] As to the first ground, Lord Merriman P. said: " But in relation to proceedings for divorce, at any rate, " we think that to say that parenthood, not legitimacy, is the " test, goes too far. It cannot, in our opinion, be suggested that " although the parenthood is undisputed, an illegitimate child " who cannot be legitimated is the subject of custody proceedings " under section 193, on the divorce of the spouses who are, in " fact, his parents."

In *Harrison* v. *Harrison*[67] Barnard J. acted on these observations of Lord Merriman P. The decision was followed in *Packer* v. *Packer*,[68] a decision of the Court of Appeal. It is, however, to be noted that Denning L.J. dissented, adhering to the principle he had expressed in *M.* v. *M.*[69]

The last case to which I need refer is *Bryant* v. *Bryant*.[70] The circumstances of the case were peculiar. The petitioner sought (a) a decree of nullity of a bigamous marriage with the respondent, and (b) a dissolution of a subsequent valid marriage with the respondent. Relief was granted accordingly. The issue before the Court of Appeal was whether the court had jurisdiction to make an order for custody of children born after the bigamous ceremony of marriage and before the decree. The court, applying *Langworthy* v. *Langworthy*,[71] held that it had the necessary power. It does not, however, follow that the decision would have been the same if the children in question had been born before the date of the bigamous ceremony. Indeed, since Morris L.J., who was a member of the court, had delivered the decisive judgment in *Packer* v. *Packer*,[72] it may be assumed the decision would have been different.

Summarizing the effect of the decisions, it seems to me that with the single exception of some observations of Denning L.J. in *M.* v. *M.*,[73] and his dissenting judgment in *Packer* v. *Packer*,[74] the decisions give consistent support to the view that the jurisdiction conferred by section 26 (1) is confined to children born between the date of the ceremony of marriage which gave rise to the suit and the date of the decree and, like Jenkins L.J., I

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[66] [1948] P. 19, 24.
[67] [1951] P. 476.
[68] [1954] P. 15.
[69] [1946] P. 31.
[70] [1955] P. 164; [1955] 2 All E.R. 116.
[71] 11 P.D. 85.
[72] [1954] P. 15.
[73] [1946] P. 31.
[74] [1954] P. 15.

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see no reason for departing from what may fairly be described as having been the received interpretation of section 26 (1) and its predecessors over a long period. I would dismiss the appeal.

Appeal allowed.

Solicitors: *Kingsford, Dorman & Co. for Buckle & Co., Peterborough; Queen's Proctor.*

J. C.*
1956
Jan. 31.

GEORGE JOHNSON AND OTHERS . . . APPELLANTS;
AND
COMMISSIONER OF STAMP DUTIES . . RESPONDENT.
[AND CROSS-APPEAL.]
PERPETUAL TRUSTEE CO. LTD. . . APPELLANT;
AND
COMMISSIONER OF STAMP DUTIES . . RESPONDENT.
FRANK BARTON FORSTER AND ANOTHER . APPELLANTS;
AND
COMMISSIONER OF STAMP DUTIES . . RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

Australia (New South Wales)—Revenue—Death Duty—Taxing section —Constitutional validity—Life tenant—Domiciled in New South Wales—"Limited interest" in property of testator—Personal property situated in part in and in part outside the State—Legislation having sufficient territorial connexion with the State —Valid under "peace, welfare and good government" powers— Not contrary to comity—Property within the State dutiable— Property outside not dutiable—Distributive provision of Act inoperative — Stamp Duties Act, 1920–1952 (*New South Wales*), *ss.* 102 (2) (*g*), 102 (2A), 144—*Constitution Act,* 1902 (*New South Wales*) (*No.* 32 *of* 1902), *s.* 5.
Statute—Dominion—Validity.

The Stamp Duties Act, 1920–1952, of New South Wales provides in section 102 (2) (*g*) for the imposition of death duty in respect of "any property in which the deceased or any other person had

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* *Present*: VISCOUNT SIMONDS, LORD OAKSEY, LORD REID, LORD KEITH OF AVONHOLM, LORD SOMERVELL OF HARROW.

"at any time either before or after the commencement of the "Stamp Duties (Amendment) Act, 1952, an estate or interest "limited to cease on the death of the deceased or at a time determined by reference to the death of the deceased (in this Act "referred to as the 'limited interest') to the extent to which a "benefit accrues or arises by cesser of the limited interest, . . ."

Section 102 (2A) provides for the inclusion in the dutiable estate of a deceased person of "all personal property situate "outside New South Wales at the death of the deceased, when— "(*a*) the deceased dies after the commencement of the Stamp "Duties (Amendment) Act, 1939; and (*b*) the deceased was, at "the date of his death, domiciled in New South Wales; and "(*c*) such personal property would, if it had been situate in New "South Wales, be deemed to be included in the estate of the "deceased by virtue of the operation of paragraph (2) of this "section."

By section 144: "This Act shall be read and construed so as "not to exceed the legislative power of the State to the intent "that where any enactment thereof would, but for this section, "have been construed as being in excess of that power, it shall "nevertheless be a valid enactment to the extent to which it is "not in excess of that power."

By his will a testator, who died in 1936 domiciled in the State of New South Wales leaving property within the State, provided, inter alia, that the trustees of the will, the appellants, should hold the net income from his residuary estate upon trust to pay one-third of the income to his wife during her life and to divide the residue of the income (including after the death of his wife the income to which she was entitled) into four equal parts and to pay one of such parts to each of his four children for life, and upon trust as to the corpus of the residuary estate for such of the issue of the four children as should be living at the death of such children. At the date of the death of the testator's wife, who died domiciled in New South Wales in December, 1952, the residuary estate of the testator vested in the appellants comprised real estate in the State and personal estate which was part located in New South Wales and part in the State of Victoria. The children of the testator were all living at the date of the death of the wife, and in consequence of her death each became entitled for life to one-fourth of the income of the estate of the testator. The children were all domiciled and resident in New South Wales.

Questions were raised by the Commissioner of Stamp Duties, the respondent, whether any part of the property included in the estate of the testator in which his wife had an interest limited to cease on her death was liable to death duty under the Stamp Duties Act, 1920–1952, and, if so, what part. It was contended for the appellants that section 102 (2) (*g*) of Act, in that it might extend to property outside the State at the death of the wife, had no such relevant territorial connexion with that State as to make it a "law for the peace, welfare and good government" of the State (section 5 of the Constitution Act of New South Wales) and was therefore ultra vires the State legislature:—

Held, (1) that section 102 (2) (*g*) extended only to property within New South Wales and that so construed it had sufficient relevant territorial connexion with the State to be valid. On the assumption that the property in which the limited interest was had could be clearly identified as being in New South Wales at the death of the wife there was a sufficient territorial connexion with the State. It was the benefit derived through the property by the cesser of the life interest that was taxed, and if the property was inside the jurisdiction at the date of death it was immaterial what were the circumstances attendant on the creation and enjoyment of the limited interest. The property enjoyed the protection of the State's laws, and fiscal legislation taxing it could be regarded as a law for the peace, welfare and good government of the State. The property situate within the State was therefore dutiable.

Commissioner of Stamp Duties (*N.S.W.*) v. *Perpetual Trustee Co. Ltd.* (*Watt's* case) (1926) 38 C.L.R. 12 and *Vicars* v. *Commissioner of Stamp Duties* (*N.S.W.*) (1945) 71 C.L.R. 309 considered.

Commissioner of Stamp Duties (*N.S.W.*) v. *Millar* (1932) 48 C.L.R. 618 and *Broken Hill South Ltd.* v. *Commissioner of Taxation* (*N.S.W.*) (1937) 56 C.L.R. 337 approved as proceeding on the correct principle.

Dicta in *Winans* v. *Attorney-General* [1910] A.C. 27, 31, 48; 26 T.L.R. 133 showed that legislation which taxed property in the circumstances covered by section 102 (2) (*g*) was not contrary to the comity of nations.

Held, (2) that with regard to that part of the personal property of the testator which was outside the State at the date of the wife's death, the nexus of domicile was completely irrelevant, and in so far as section 102 (2A) purported to extend the operation of paragraph (*g*) it was invalid. That part of the estate was accordingly not dutiable. The wife's only interest was a limited interest ceasing on her death, and it was not her estate that was brought into charge. If the presence of the property in the State at her death was lacking, every other incident or circumstance associated with the limited interest might also find its place outside the State. The domicile of the wife in the State at the date of her death was a quite insufficient ground by itself to make good the lack of any other connexion with the State.

Further, section 144 did not operate to save section 102 (2A) in its application to paragraph (2) (*g*) in cases where some other element than domicile was present which would give a sufficient nexus within the State, such as the presence of the remainderman. There was here no scope for the application of the distributive principle, for there was no way of splitting up section 102 (2A) into good and bad in its application to paragraph (2) (*g*): it was wholly bad; it applied solely to property outside New South Wales which, ex hypothesi, the domicile of the wife in that State was insufficient of itself to subject to charge. To invoke the presence in the State of the person liable to the duty, in order to save the enactment in part, was to bring in something from outside the enactment, and that was not legitimate.

Carter v. *Potato Marketing Board* (1951) 84 C.L.R. 460 and *Newcastle and Hunter River Steamship Co. Ltd.* v. *Attorney-General for the Commonwealth* (1921) 29 C.L.R. 357 distinguished.

Judgment of the Supreme Court of New South Wales (1955) 55 S.R.(N.S.W.) 398 affirmed.

These three appeals (and a cross-appeal to the first appeal) (Nos. 33, 34 and 35 of 1955), which were heard together, raised certain questions as to the validity of assessments to death duty, made by the Commissioner of Stamp Duties, under the Stamp Duties Act, 1920–1952, of the State of New South Wales. The Supreme Court of New South Wales (April 20, 1955), on cases stated by the commissioner, in the first case in part upheld and in part rejected the assessment, and in the other two cases upheld the assessments in whole. The judgment of the court in the first case determined the result in the other two cases.

The following facts and statutory provisions are taken from the judgment of the Judicial Committee.

Appeal by Johnson's Trustees

Frank Johnson (hereinafter called the testator) died on August 20, 1936, being then domiciled in the State of New South Wales and leaving property within that State. Probate of his will and three codicils thereto was granted on December 29, 1936. to the appellants, the executors named in the will and codicils and the present trustees thereof. By his will the testator, after the bequest of certain pecuniary legacies, gave, devised and bequeathed all his real and personal estate upon trust to sell, with power to postpone; to pay his debts, funeral and testamentary expenses, State probate, Federal estate and all other duties and the said legacies; to invest and to stand possessed of the investments and to hold the net income from the residuary estate upon trust to pay one-third of the income to his wife Sarah Johnson during her life, and to divide the residue of the income (including after the death of his wife the income to which she was entitled) into four equal parts and to hold such income upon trust to pay one of such parts to each of his four children for life, with gifts over of the income of a child dying before the distribution of the residuary estate, and upon trust as to the corpus of the residuary estate for such of the issue of the four children of the testator as should be living at the death of such children respectively and should attain the age of 21 years, in equal shares per stirpes as tenants in common.

The said Sarah Johnson (hereinafter called the deceased) died on December 8, 1952, being then domiciled in the State of New South Wales and leaving property within the said State. At the date of the death of the deceased the executorial duties in respect of the estate of the testator had been carried out, and the residuary estate vested in the appellants comprised (excluding real estate in Queensland which was not affected by this appeal) real estate in New South Wales, valued at the date of death of the deceased at £15,000, and personal estate consisting of shares in public companies and Commonwealth inscribed stock and debts due by a proprietary company to the appellants. The total value of the said property and assets at the date of death of the deceased was £97,639 14s. 9d. Part of the personal estate was located in New South Wales and part in the State of Victoria. At the date of the death of the deceased two of the appellants, namely, George Johnson and George Edgerley Johnson, were domiciled and resident in the State of New South Wales. The third appellant, Perpetual Trustee Company (Limited), was incorporated and carried on business in the said State. The children of the testator were all living at the date of the death of the deceased and in consequence of her death were each entitled for their respective lives to one-fourth of the income of the estate of the testator, having previously been each entitled to one-fourth of two-thirds of the said income. The children were all domiciled and resident in the State of New South Wales.

On the basis of those facts the commissioner included in the dutiable estate of the deceased the whole of the property and assets of the estate of the testator to the extent to which a benefit accrued or arose by cesser of the interest therein of the deceased limited to cease on her death, and valued such benefit at one-third of the principal value of the said property and assets, namely, after a certain immaterial adjustment, £32,297. For the purpose of assessing death duty on the estate of the deceased the commissioner treated the said property and assets, to the extent to which a benefit accrued or arose by cesser of the interest therein of the deceased, as an estate by itself and separately assessed duty thereon in the sum of £3,633 8s. 3d.

The Commissioner of Stamp Duties stated the following questions for the determination of the Supreme Court:—

(1) Whether any part of the property included in the estate of the testator in which Sarah Johnson had an interest limited to cease on her death was liable to duty under and by virtue of the provisions of the Stamp Duties Act, 1920–1952.

(2) If the answer to question (1) be in the affirmative—(*a*) what part of such property was liable to duty as aforesaid? (*b*) what was the value attributable to such part thereof for the purpose of assessing death duty thereon in accordance with the provisions of the said Act?

The Supreme Court (Maxwell J., Roper C.J. in Eq., and Herron J.) answered the questions as follows: (1) Yes; (2) (*a*) Such of the said property as was situate at the date of the death of Sarah Johnson in the State of New South Wales; and found it unnecessary to answer (2) (*b*). Against that judgment the trustees of the will of Frank Johnson now appealed, and the Commissioner of Stamp Duties cross-appealed, to their Lordships' Board.

The deceased died on December 8, 1952.

The Stamp Duties Act, 1920–1952, contained the following provisions:

" 101D.—(1) In the case of every person who dies after the " commencement of the Stamp Duties (Amendment) Act, 1939, " whether in New South Wales or elsewhere, and who was at " the date of his death domiciled in New South Wales, duty " (hereinafter called death duty) at the rates mentioned in the " Seventh Schedule to this Act, shall subject to this section be " assessed and paid upon the final balance of the estate of the " deceased as determined in accordance with this Act. . . .

" 101E. In the case of every person who dies after the com" mencement of the Stamp Duties (Amendment) Act, 1939, " whether in New South Wales or elsewhere, and who was at " the date of his death domiciled outside New South Wales, " duty (hereinafter called death duty) at the rate or rates " mentioned in the Eighth Schedule to this Act shall be assessed " and paid upon the final balance of the estate of the deceased " as determined in accordance with this Act. . . .

" 102. For the purposes of the assessment and payment of " death duty but subject as hereinafter provided, the estate of a " deceased person shall be deemed to include and consist of the " following classes of property:—

" (1) (*a*) All property of the deceased which is situate in New " South Wales at his death.

" And in addition where the deceased was domiciled in New " South Wales all personal property of the deceased situate outside New South Wales at his death . . . to which any person " becomes entitled under the will or upon the intestacy of the " deceased, except property held by the deceased as trustee for " another person under a disposition not made by the deceased.

" (2) . . . (*g*) (i) Any property in which the deceased or any " other person had, at any time either before or after the commencement of the Stamp Duties (Amendment) Act, 1952, an " estate or interest limited to cease on the death of the deceased " or at a time determined by reference to the death of the " deceased (in this Act referred to as the ' limited interest ') to " the extent to which a benefit accrues or arises by cesser of the " limited interest, whether or not the limited interest has been " surrendered, assured, divested or otherwise disposed of, whether " for value or not, to or for the benefit of a person entitled to an " estate or interest in the property in remainder or reversion " expectant upon the determination of the limited interest. " Provided that where the limited interest was so surrendered, " assured, divested or disposed of not less than three years before " the death of the deceased, and bona fide possession and enjoyment of the property was assumed immediately after the " limited interest was so surrendered, assured, divested or disposed of, and thereafter retained to the entire exclusion of the " person theretofore entitled to the benefit of the limited " interest, and of any benefit to such person, whether enforceable or not, the property shall not be deemed part of the " estate.

" The value of the benefit accruing or arising from the cesser " of the limited interest shall—(*a*) if the limited interest extended " to the whole of the income or benefits of the property, be the " principal value of that property; and (*b*) if the limited interest " extended to less than the whole of the income or benefits of " the property, be the principal value of an addition to the " property equal to the income or benefits to which the limited " interest extended.

" In the application of this subparagraph to and in respect of " a limited interest which is an annuity the property out of which " or out of the income or proceeds of which the annuity is payable shall be deemed to be held for an estate or interest in " remainder or reversion expectant upon the determination of " the annuity. . . .

" (2A) All personal property situate outside New South Wales "at the death of the deceased, when—(*a*) the deceased dies "after the commencement of the Stamp Duties (Amendment) "Act, 1939; and (*b*) the deceased was, at the date of his death, "domiciled in New South Wales; and (*c*) such personal property "would, if it had been situate in New South Wales, be deemed "to be included in the estate of the deceased by virtue of the "operation of paragraph (2) of this section.

" 105A.—(1) Any property which is deemed to be included in "the estate of any deceased person solely by virtue of the "operation of subparagraph (*g*) of paragraph (2) of section one "hundred and two of this Act or of that subparagraph as "extended in its application by paragraph 2 (*a*) of that section "(in this Act referred to as 'non-aggregated property') shall not "be aggregated with the balance of the estate of the deceased "but shall be separately assessed and shall for that purpose be "an estate by itself: Provided that the aggregate of all non-"aggregated property included in the dutiable estate consequent "upon the cesser of limited interests which were created by the "same person shall be separately assessed and shall for that "purpose be an estate by itself. . . .

" 114A.—(1) Death duty separately assessed in respect of non-"aggregated property shall constitute a debt payable to Her "Majesty out of the non-aggregated property and such duty shall "be paid accordingly out of the non-aggregated property by the "person in whom the non-aggregated property is vested.

" (2) For the purpose of paying the duty the person in whom "the non-aggregated property is vested, if a trustee, may raise "the amount of the duty by mortgage or sale of the non-"aggregated property.

" (3) The person in whom the non-aggregated property is "vested shall not be liable for any duty in excess of the assets "constituting the non-aggregated property.

" 115A.—(1) Death duty separately assessed in respect of non-"aggregated property shall become due and payable on the "assessment thereof by the commissioner, or if not duly so "assessed within six months from the death of the deceased then "on the expiration of that period of six months;

" (2) Such duty shall constitute, as from the death of the "deceased, a charge upon so much of the non-aggregated pro-"perty as is situated in New South Wales, but no such charge "shall affect the title of a bona fide purchaser for value (whether "before or after the death of the deceased) without notice.

"(3) In case the duty is not paid within the prescribed time "the commissioner may apply to the Supreme Court, which may "order that a sufficient part of the non-aggregated property so "situated be sold and the proceeds of such sale applied in payment of the duty and of the costs consequent thereon.

"(4) Where any property has been sold under any such order "the Supreme Court may make an order vesting the property "in the purchaser. . . .

"120.—(1) Where any property which is or the value of "which is included in the dutiable estate of a deceased person is "vested in any person other than the administrator, the duty "payable in respect thereof (other than death duty separately "assessed in respect of non-aggregated property) shall be paid "by the persons entitled thereto according to the value of their "respective interests therein, to the administrator.

"(2) Every person who as beneficiary, trustee, or otherwise "acquires possession or assumes the management of any such "property (including non-aggregated property), shall upon retaining the same for his own use, or distributing or disposing "thereof, and in any case within three months after the death "of the deceased, deliver to the commissioner a full and true "account certified by oath of such property, together with a "valuation thereof by a competent valuer: Provided that the "time for delivering the account or valuation may be extended "by the commissioner.

"(3) Any person directed by this section to deliver an account "of any property shall upon the assessment of the duty payable "in respect thereof be liable to pay such duty (including death "duty separately assessed in respect of non-aggregated property) "and interest thereon at the rate of eight pounds per centum "per annum from the date of the expiration of the period of "six months after the death of the deceased or if administration "has been first granted out of New South Wales, from the date "of the expiration of the period of twelve months after the death "of the deceased, and if a trustee may raise the same by "mortgage or the sale of the property.

"(5) In case the account and valuation is not lodged within "the time abovementioned, or if the duty is not paid within one "month after assessment, the commissioner or any person "interested may apply to the Supreme Court, which may order "that a sufficient part of such property be sold, and the proceeds "of such sale applied in payment of the duty and of the costs "consequent thereon.

"(6) Where any property has been sold under any such "order the Supreme Court may make an order vesting the "property in the purchaser."

The relevant facts in the appeals of the Perpetual Trustee Co. Ltd. and of Frank Barton Forster against the Commissioner of Stamp Duties appear from the judgment of the Judicial Committee.

1955. Nov. 22, 23, 24, 28. *Sir Garfield Barwick Q.C.* and *K. S. Jacobs* (both of Australia) for the appellants in all three appeals. The question is whether or not section 102 (2) (*g*) of the Stamp Duties Act of New South Wales shows a sufficient nexus in the territory of that State to come within the general legislative power of the Parliament of New South Wales—a legislature of limited sovereignty—to make laws for the peace, welfare and good government of the territory. There is no question here of any competition with any Commonwealth power. The three cases are in the nature of test cases to see what is the real limit of the legislation. The appellants' submissions fall under three heads: (1) On the correct construction of section 102 (2) (*g*), it applies to property wherever situate and is not confined to property situate in New South Wales at the date of the death of the life tenant. (2) So construed, it is invalid as being beyond the territorial competence of the local legislature to make laws for the peace, welfare and good government of the State. (3) Alternatively to the first submission, if, on the right construction, the section is limited to affecting property within New South Wales at the death of the life tenant, it is nonetheless invalid, because the presence in the State of the property in the circumstances of this case was not a relevant nexus with the legislative power.

What paragraph (*g*) is seeking to do is to bring into the estate of the deceased person the benefit which has arisen by cesser whether before or at the death and whether by the act of the deceased or not, and to make the resulting duty payable by the owner of the property at the date of the death, whether he be the remainderman or not, including a purchaser, and to do this without reference in terms to the location of the property. It is submitted that the reasoning in *Commissioner of Stamp Duties* (*N.S.W.*) v. *Perpetual Trustee Co. Ltd.* (*Watt's* case)[1] is quite inapt in relation to paragraph (*g*). That reasoning rather confined itself to the case of the deceased's own property which he had disposed of. Insofar, however, as *Watt's* case [1] decided that the section then under consideration (section 102 (2) (*a*), (*c*) and (*g*)) should be construed as limited to property within the State at the date of the death of the deceased and that it was valid on that basis, it was incorrectly decided. *Watt's* case [1] was applied in *Vicars* v. *Commissioner of Stamp Duties* (*N.S.W.*).[2] What was read into *Watt's* case [3] was property in the hands of the transferee or donee at the date of the death.

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[1] (1926) 38 C.L.R. 12.

It is submitted that paragraph (*g*) is not in consimili casu with the rest of the paragraphs in section 102 (2), so the reasoning which introduced words into the other paragraphs is not apt to satisfy the case of paragraph (*g*). When one turns to paragraph (*g*) one finds this peculiarity, the duty is laid on the person who actually has the property whether he is the original transferee or not. *Watt's* case [3] and *Vicars'* case [4] are not authority for saying that one ought to introduce the limitation in *Watt's* case [5] into paragraph (*g*); one ought not to introduce " any property in New " South Wales " in the donee into paragraph (*g*): that paragraph does not require property to be in New South Wales either (i) during the subsistence of the limited interest, or (ii) does it require property to be in New South Wales in the hands of the remainderman—in his ownership at any time. [Reference was made to *Harding* v. *Commissioners of Stamps for Queensland* [6] and *Attorney-General* v. *Beech*.[7]]

The question is, are the words " in New South Wales " necessary as a matter of mere construction in paragraph (*g*)? There is no room for inserting anything in paragraph (*g*)—it must be taken as drawn, and so taken, it is not within the power. Secondly, section 144 does not effectively put the words " in New South " Wales " in. Further, even if they were in, would they furnish territorial nexus? The mere presence within the State of the property of the remainderman does not furnish a sufficient nexus with the State to support a statute levying tax on such property upon the death of a deceased wherever the death may take place and wherever the deceased had been resident or domiciled. The duty is not levied in respect of the presence in the State of the remainderman's property, but solely in respect of the death of the person entitled to a limited interest as defined. The Act does not make the presence of the property in New South Wales in any sense a criterion of liability. [Reference was made to *Commissioner of Stamp Duties (N.S.W.)* v. *Millar* [8] and *Broken Hill South Ltd.* v. *Commissioner of Taxation (N.S.W.)*.[9]]

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[1] 38 C.L.R. 12.
[2] (1945) 71 C.L.R. 309.
[3] 38 C.L.R. 12.
[4] 71 C.L.R. 309.
[5] 38 C.L.R. 12.
[6] [1898] A.C. 769, 772; 14 T.L.R. 488.
[7] [1899] A.C. 53; 15 T.L.R. 85.

The limitation which *Watt's* case [10] introduced into the other paragraphs was that the property should be in New South Wales in the hands of the transferee as at the date of the death. That reasoning could not be used to introduce this limitation into paragraph (*g*).

In relation to the law constituted by section 102 (2A) in association with section 102 (2) (*g*), the domicile of the deceased person in New South Wales at the date of his death does not furnish a sufficient nexus with the constitutional power of the State. Section 102 (2A) is dealing with a policy which is quite different from that which is in paragraph (*g*), and (2A) has been held incapable of being construed so as to apply to paragraph (*g*); and the Supreme Court in their judgment in the present case said that "in so far as section 102 (2A) purports to extend the operation of paragraph (*g*) it is, we think, invalid." Even if it be assumed that section 102 (2) (*g*) is valid, it is beyond the legislative competence of the Parliament of New South Wales to levy duty on property outside the State in which a person who dies domiciled in the State had an estate or interest limited to cease on his death or at a time determined by reference to his death. [*Pidoto* v. *State of Victoria* [11] was referred to.]

Lastly, if the Supreme Court's view is right that in point of mere construction one can find a limitation, and if the submission for the appellants is right that that limitation is inadequate to support the validity of the provision, then, and only then, can the distributive provisions of section 144 be applied. [Reference was made to *Nelungaloo Pty. Ltd.* v. *Commonwealth of Australia*.[12]]

H. A. Snelling Q.C., S.-G. for N.S.W., *R. Else-Mitchell Q.C.* and *K. J. Holland* (all of Australia) for the Commissioner of Stamp Duties. A number of considerations support the Supreme Court's decision and make the interpretation of section 102 (2) (*g*) reasonably plain. The first consideration is the terms of section 17 of the New South Wales Interpretation Act of 1897, which provide that: ". . . in an Act . . . all references to localities, "jurisdictions, and other matters and things shall, unless the "contrary intention appears, be taken to relate to such localities, "jurisdictions, and other matters and things in and of New South

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[8] (1932) 48 C.L.R. 618, 630.
[9] (1937) 56 C.L.R. 337, 356.
[10] 38 C.L.R. 12.
[11] (1943) 68 C.L.R. 87.
[12] [1951] A.C. 34, 51.

"Wales"; and see *Vicars'* case.[13] The second consideration is the original scheme of the Stamp Duties Act as passed in 1920, and, as pointed out in *Watt's* case,[14] the whole of the provisions of that Act were confined to property in New South Wales—expressly as regards testamentary property. There was no attempt by the Act in *Watt's* case [14] to make dutiable any property outside the State. When the 1952 legislation was passed, the legislature re-inserted paragraph (*g*) into a well-established scheme. It had a restricted meaning of property in New South Wales, and the language of a number of provisions in the Act of 1952 show that that was the motive of the legislature: sections 102 (A), 105 (A) (1), 112 (E) and 123 (1) (A). [*In re Haig, decd.*,[15] was referred to.]

In the light of the decisions in *Watt's* case [16] and *Vicars'* case,[17] and of the Interpretation Act and of the broad principles stated above, read in conjunction with the actual provisions of the Act as it existed from time to time, there is really no necessity to make use of section 144 at all on this point. Everything that has been said leads to a reasonably plain conclusion that the limitation which should be placed on paragraph (*g*) is property within New South Wales at the date of death.

It was then said for the appellants that even if such a limitation is to be accepted, the nexus is not sufficient because it was said that the presence of the property is not the basis of the tax. I must confess to some little difficulty in grasping this argument. When once one comes to the conclusion that words must be supplied as if the legislature had put them in—"property in New "South Wales as at the date of the death"—the legislature is putting that as the critical consideration. [Reference was made to *Winans* v. *Attorney-General*.[18]] In *In re Haig, decd.*,[19] it was said that mere presence of property within the United Kingdom should be regarded as justifying the assessment of taxation irrespective of the domicile of the testator, the proper law of the trust and other considerations. *Skinner* v. *Attorney-General* [20] establishes in an assessable interest case that the factor of property within the jurisdiction is not any strange notion as a basis of taxation.

The Supreme Court rightly held (1) that the New South Wales legislature has power under the Constitution Act, 1902, s. 5, to make laws for the peace, welfare and good government of New South Wales; (2) that the only legislation which is beyond this power is legislation on a subject which has no relevant territorial connexion whatever with New South Wales; (3) that section 102 (2) (*g*) on its proper construction applies only to property situate within New South Wales; and (4) that the situation of property within New South Wales is a sufficient nexus to support the validity of legislation imposing taxation on or in respect of such property, no matter what event is chosen as the reason for its imposition.

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[13] 71 C.L.R. 309, 338.

[14] 38 C.L.R. 12.

[15] (1938) 17 A.T.C. 635, 647.

[16] 38 C.L.R. 12.

[17] 71 C.L.R. 309.

[18] [1910] A.C. 27, 47; 26 T.L.R. 133.

[19] 17 A.T.C. 635.

[20] [1940] A.C. 350; 55 T.L.R. 1025; [1939] 3 All E.R. 787.

With regard to the cross-appeal, it is suggested that the 1952 amending Act was intended to introduce into New South Wales a duty of the same nature in substance as in one situation had been covered in the United Kingdom since 1894. Although in section 102 (1) of the New South Wales Act the word "passing" is not used—as it is in the English Act of 1894—the basic notion of the United Kingdom legislation has been adopted. [*Earl Cowley* v. *Inland Revenue Commissioners*[21] was referred to.] In essence, what the 1952 Amendment Act seeks to do is the same as was done as regards limited interests under section 1 of the Act of 1894. The context of the Act of New South Wales shows that both the estates passing and estates ceasing would be covered by the extended provisions of the Act, whereas the context in the Act of 1894 shows that an estate passing was covered by section 1, and estates ceasing by section 2 (3).

To decide on the sufficiency of the nexus of domicile of the life tenant it is necessary to consider what are the nature and essence of the situation to which death duty is by the Act of 1952 extended: see *In re Earl Cowley's Estate.*[22] Subsection (2A) deals with the case where property is outside the State but the life tenant is domiciled in the State. If that provision is constitutionally good as it relates to a life tenant, the fact that it also relates to the case of paragraph (*g*) will not render it bad. Both section 102 (2) (*g*) and the extension effected by (2A) are not isolated provisions, but are embedded in the context with various incidents, some of which show that the legislature was aware of, and recognized the necessity for, territorial limitations: section 115 (A).

The principal submission on this matter is that a person whose permanent home of choice is New South Wales has received and enjoyed income, use or benefit of personal property outside New

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[21] [1899] A.C. 198, 210; 15 T.L.R. 270.

[22] [1898] 1 Q.B. 355, 374; 14 T.L.R. 92.

South Wales during his life; he has only in a true case an interest in the principal; while so doing he has had the protection and advantage of the New South Wales laws and government, and therefore (1) it is not inappropriate that that State should impose a tax on his death; (2) it is not inappropriate to place the burden of such tax on the person who benefits immediately by the death, particularly when one qualifies that by seeing to the extent to which he benefits; and (3) it is to be borne in mind that all forms of estate duty, no matter by whom they are to be paid, in the first instance fall in substance on the person who next enjoys the benefit of the property.

A problem closely related to that now in question was considered in *Tooth* v. *Brisbane City Council*[23]; the test there set out may be considered to be sound. See also *Broken Hill South Ltd.* v. *Commissioner of Taxation* (*N.S.W.*).[24] The only connexion here is the domicile of the life tenant; that is, however, and the English legislation always regarded it as, one of the relevant factors, and this Board should not say that the Government of New South Wales is not entitled to select it as opposed to any other factor. It is a sufficient nexus to justify taxation. Different combinations of factors have been selected by the legislature of the United Kingdom: Finance Act, 1936, s. 24; Finance Act, 1949, s. 28 (2). The closest decision is the *Haig* case,[25] which does amount to some indication that domicile of the life tenant was regarded as a test. What is the test of sufficiency of territorial connexion is to some extent a question of degree: see *Wallace Brothers & Co. Ltd.* v. *Commissioner of Income Tax, Bombay City*,[26] where a great many authorities on territorial limits were cited in argument.

One must look at the whole of the contents of the Act of 1952 and not consider merely (2A) as an isolated provision so drastic and far-reaching that it compels the notion that it is outside the State's competence. This duty has been held consistently by the highest tribunals not to partake of the nature of a succession or legacy duty; the test more appropriate to those duties is the domicile of the testator.

As to the scope of the jurisdiction of the New South Wales Parliament, it is for the legislature to decide whether it is legislation for the peace, welfare and good government of the State, and its reasonableness is not a matter for judicial consideration unless, perhaps, the unreasonableness of a provision is so manifest

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[23] (1928) 41 C.L.R. 212, 220, 236.

[24] 56 C.L.R. 337, 375.

[25] 17 A.T.C. 635, 643.

[26] (1948) L.R. 75 I.A. 86, 97–98.

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and obvious that it shows that the legislature was not regarding its charter. Whether it is a law for the government might be the true test. The legislation will be looked at as a whole and not necessarily split up and one feature isolated and selected. [Reference was made to *Edwards* v. *Attorney-General for Canada.*[27]]

Finally on this matter, the legislature was faced with the question of making a selection of a nexus in respect of personal property outside the State, and it selected the nexus of the domicile of the person who had up to the date of death enjoyed the property. That person was considered as a permanent resident in point of law in the State, and in the great majority of cases such person would be found to be living in New South Wales and enjoying the benefit of New South Wales law and in receipt of the income as life tenant or an annuity for life. Tax on the property passing was within the jurisdiction and the burden has been placed on the person immediately benefited.

Next, assuming that the above contention is wrong and that the selection by itself of the domicile of the life tenant is not a sufficient nexus to give jurisdiction, and that (2A) would be invalid apart from the presence of section 144, it is conceded at once that section 144 presents difficulties. It has always been recognized that one purpose of such a provision is to reverse any presumption that the legislature wished its legislation to stand as a whole, and to make it clear that it wished, on the contrary, such parts of it as were within the jurisdiction to stand: *The King* v. *Poole, Ex parte Henry* (*No.* 2).[28] It is submitted that section 144 operates to this effect, that if individual cases in which the only nexus found to exist is the domicile of the life tenant are in doubt, the Act validly applies to cases where there are other and sufficient elements present.

Applying the principles in *Newcastle and Hunter River Steamship Co. Ltd.* v. *Attorney-General for the Commonwealth*[29] and *Carter* v. *Potato Marketing Board*[30] to the present case, there would be under the full ambit of the Stamp Duties Act as amended in 1952 all cases included where the domicile of the life tenant was in New South Wales. One might divide that into two compartments. There would be such cases where the person in whom the property vested on death, be he trustee or beneficiary, was within the State at the date of the death; there would be, on the other hand, cases where the trustee or beneficiary was outside the State at the time of the death; and on its words the Act would apply to both. On the assumption with which this branch of the argument was started—that the domicile of the life tenant was not a sufficient nexus—the second category only containing the assumed insufficient element of domicile of the life tenant would be beyond power, since the property was outside the State at the death; the first category of cases which contained in addition to the insufficient element of domicile of the life tenant the element of presence within the jurisdiction of the persons from whom the duty is to be recovered would, it is submitted, be within power; and the legislature in the Act itself has indicated that it was at least regarding such category: section 120. The legislation is general in its terms and covers all cases, and only such cases as contain an insufficient nexus must be thrown out. The legislature had in mind some person against whom process could be served in the State.

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[27] [1930] A.C. 124, 136; 46 T.L.R. 4.

[28] (1939) 61 C.L.R. 634.

[29] (1921) 29 C.L.R. 357.

[30] (1951) 84 C.L.R. 460.

If that proposition is too broad, reliance is placed on the narrower proposition that at least there remains valid by virtue of section 144 such area of cases of the whole generality as can be seen to have been in the direct contemplation of the statute. It is submitted that the Act does directly contemplate an area of cases where the additional sufficient element—the presence within the jurisdiction of the trustee or remainderman—appears: sections 105, 114A and 120, all of which sections contemplate a group of cases at least where the person alive is within the jurisdiction.

Sir Garfield Barwick Q.C., as respondent to the cross-appeal. It is little to the point that the United Kingdom—which is not affected by territorial limitation—has thought fit to frame its death duty in some particular terms. The United Kingdom has never sought to do what this Act purports to do. I must face the cross-appeal on the assumption that section 102 (2) (*g*) has interpolated after the words " any property " the words " situate " in New South Wales at the date of the death of the deceased." Every event connected with the property itself, once one brings (*g*) into (2A), may have been external to New South Wales, and the domicile of the deceased on his death may be entirely unconnected with the property or any incident concerning it. [*Winans* v. *Attorney-General*[31] was referred to.] Section 102 (2A) requires a person who may be unconnected at the relevant date or at any other time with the limited interest or with the cesser, who may never have been connected with New South Wales at all, to pay duty out of the property in circumstances none of which have necessarily any connexion with New South Wales except the deceased on his death. This is not a law for the peace, welfare and good government of the State, because there is no connexion between what the law does and the territory of New South Wales. [Reference was made to *Barcelo* v. *Electrolytic Zinc Co. of Australasia Ltd.*[32] and *Commissioner of Stamp Duties (N.S.W.)* v. *Millar.*[33]] It comes to this on a consideration of (2A), (*g*) and section 114A, that duty is laid on a person unconnected with New South Wales on property unconnected with New South Wales on the sole circumstance that at the date of his death the person in respect of whose life the former limited interest was limited was domiciled in New South Wales.

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[31] [1910] A.C. 27.

Section 144 is to be treated as a rule of law and not a rule of construction. There is no room for taking the course suggested for the commissioner. What is meant by "distributive" is that one must give the statute a distributive construction in point of language: *Australian National Airways Pty. Ltd.* v. *The Commonwealth.*[34] It does no more than to allow one to take the statute and, as it were, construct departments by distributing it so as to blue pencil the ineffective compartment. Section 144 does not assist the commissioner.

In reply on the appeal: with regard to the construction of (*g*), and first apart from section 144, the rule is that prima facie the legislature did not intend to offend, and the court should not imply something which offends, against the comity of nations. Here, the commissioner asks the court to make an implication in (*g*) which would offend comity, because it is seeking to bring to tax the assets of a foreign settlement. The State has set out to cast its net too wide.

H. A. Snelling Q.C. in reply on the cross-appeal. The following cases throw some light on (1) whether there is any distinction between cases of a mere cesser as opposed to the passing of a life interest, and (2) on the broader question whether the duty is more in the nature in its essence of estate duty on the one hand or, on the other hand, of succession duty: *In re Earl Cowley's Estate*[35]; *Winans* v. *Attorney-General*[36]; *In re White, Skinner* v. *Attorney-General*[37]; *Inland Revenue* v. *Clark's Trustees*,[38] and

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[32] (1932) 48 C.L.R. 391, 427–428.

[33] 48 C.L.R. 618, 631.

[34] (1945) 71 C.L.R. 29, 92.

[35] [1898] 1 Q.B. 355, 375–376.

[36] [1910] A.C. 27, 30.

[37] [1939] Ch. 131, 139.

[38] 1939 S.C. 11, 20, 25.

Skinner v. *Attorney-General.*[39] The distinction has been steadily maintained between the kind of duty in the present case not necessitating any basis of domicile and succession and legacy duty.

A sovereign State, while it may have its legislation interpreted in the light of the comity of nations, is not bound in its constitution by that comity, but merely by the terms of its constitution: *Polites* v. *The Commonwealth.*[40] The case for the commissioner may be put in two ways: (1) The nature of the duty which is in question here is not such as to attract the maxim mobilia sequuntur personam and the doctrine of domicile qua administration of mobilia, and, even if it would, (2) the legislative power of New South Wales is not subject to the same precise limitations as rules of comity, if, indeed, they are precise limitations.

On the subject of sufficient territorial nexus, *Commissioner of Stamp Duties* (*N.S.W.*) v. *Millar*[41] must be regarded as having been decided on its own circumstances and as not establishing any principle. Where one finds in a taxing Act recovery provisions which are only really effective within the State, and clearly only contemplate the ability of the legislature to recover from persons or property within the State, such recovery provisions give a character to the legislation which will tell in favour of validity. Domicile of the life tenant is a relevant connexion, and being relevant is a law for the government of New South Wales and accordingly is not outside the plenary power of the legislature.

If the main argument as to sufficiency of nexus is wrong, then it is submitted that subsection (2A) does not need any words being added by way of limitation or otherwise in order that section 144 may operate on it. In its terms it says that the duty shall be chargeable whenever the life tenant is domiciled in New South Wales. If section 144 is to come into operation the Act should remain valid at least to the extent to which it can be validly enforced—that must be taken to have been the intention of the legislature.

1956. Jan. 31. The judgment of their Lordships was delivered by LORD KEITH OF AVONHOLM, who stated the facts and statutory provisions set out above and continued: Their Lordships would observe that, while section 102 (1) deals with property of the deceased to which any person becomes entitled by will or on intestacy of the deceased and so is property of which he died possessed, section 102 (2) includes a large number of categories of dutiable estate (not set out above) consisting mainly of property of which the deceased had disposed, or rights which he had created in third parties, during his lifetime, or within three years of his death, without full consideration. Most, if not all, of these cases are familiar in corresponding British legislation and have been compendiously referred to in various cases in the Australian courts as notional property of the deceased. They are cases which differ in origin and nature from the property described in paragraph (*g*) of section 102 (2) which need have been at no time the property of the deceased and the limited interest in which will normally not have been created by the deceased.

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[39] [1940] A.C. 350.

[40] (1945) 70 C.L.R. 60, 78.

[41] 48 C.L.R. 618, 632.

The question at issue on the appeal may now be stated. To quote the words of the Supreme Court:—" The legislature of " New South Wales is a subordinate legislature. Its powers are " to be found in the Constitution Act, 1902, section 5 of which, " so far as material, provides that:—' The legislature shall, " ' subject to the provisions of the Commonwealth of Australia " ' Constitution Act, have power to make laws for the peace, " ' welfare, and good government of New South Wales in all " ' cases whatsoever.' Legislation on any subject-matter which " has no relevant territorial connexion whatever with New South " Wales falls outside the power of the legislature of New South " Wales (see *Attorney-General* v. *Australian Agricultural* " *Company*,[1] and *Commissioner of Stamp Duties* (*N.S.W.*) v. " *Millar* [2]).

" One must examine the Stamp Duties Act, therefore, to see " whether there is a relevant nexus between the property dealt " with in paragraph (*g*) and the State of New South Wales, " bearing in mind that under paragraph (*g*) property is brought " into the estate of the deceased whom, for convenience, we will " call the life tenant, although, of course, paragraph (*g*) has a " wider application than merely to cases where the deceased was " a life tenant. It is brought in only for the purpose of it thereupon being segregated and treated as a separate estate; it is " brought in wherever the life tenant died and wherever he was " domiciled (section 101/101E). It is so brought in wherever the " remaindermen, or in the case of equitable estates, the trustee, " resides or is domiciled, and without regard to the system of " law by reference to which the instrument creating the limited " interest or regulating the rights of the remaindermen was " executed, or to which it owes its force, or by reference to which

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[1] (1934) 34 S.R.(N.S.W.) 571.

[2] (1932) 48 C.L.R. 618.

"it would be administered. On these grounds it is said that "no relevant connexion with the State of New South Wales "appears from the legislation."

On the question thus posed the Supreme Court reached the conclusion that section 102 (2) (*g*) extended only to property within New South Wales and that so construed it had sufficient relevant territorial connexion with New South Wales to withstand the challenge of invalidity. In their Lordships' view the Supreme Court were right. While the statute in its present form is the result of a period of growth through legislative amendments made on the original Act over a long period of years, the broad statutory scheme of the Act as it now stands seems fairly plain. The Act has regard first of all to persons dying domiciled in New South Wales and to persons dying domiciled outside New South Wales (sections 101D and 101E). By subsection (1) of section 102 the estate of a deceased person is deemed to include and consist of (*a*) his property situate in New South Wales at his death, and in addition (*b*) his personal property situate outside New South Wales at his death where he died domiciled in New South Wales. The person who is domiciled in New South Wales and the person who is not so domiciled are alike caught under (*a*) but the person who is not so domiciled escapes under (*b*). It would be a remarkable thing if the statute when it comes to deal with the various very special categories of property brought in for purposes of death duty by subsection (2) of section 102 cast the net wider than was done under subsection (1), by including under subsection (2) property inside and outside New South Wales, irrespective of whether the deceased died domiciled there or not. In their Lordships' view this would be an unreasonable construction to place upon the statute. That it was not so intended would, indeed, seem to follow from the addition of subsection (2A), which would be otiose if property under subsection (2) already included property inside and outside New South Wales. But as regards paragraph (*g*) the matter, is in their Lordships' judgment, concluded by references in sections 102A, 105A and 112E to subparagraph (*g*) "as extended in its application by paragraph (2A)." The only extension made by (2A) was to bring in property situate outside New South Wales where the deceased died domiciled in New South Wales. The natural reading is that paragraph (*g*) of itself is confined to property inside New South Wales. This view is in harmony with decisions of the High Court of Australia, when dealing with other paragraphs of subsection (2) of section 102, in *Commissioner of Stamp Duties* (*N.S.W.*) v. *Perpetual Trustee Co. Ltd.* (*Watt's* case)[3] and *Vicars* v. *Commissioner of Stamp Duties* (*N.S.W.*).[4] In reaching their conclusion that the statute should be so read, their Lordships have found no occasion to invoke section 17 of the Interpretation Act of 1897.

It is contended, however, that, even if paragraph (*g*) be limited to property within New South Wales, that is not sufficient to create a territorial nexus with New South Wales when regard is had to the subject-matter of paragraph (*g*). Everything, it is said, which is contemplated by paragraph (*g*) may take place outside New South Wales. The limited interest may be created outside New South Wales; the person with the limited interest may be a foreigner living outside New South Wales; he may hold the interest pur autre vie, that is, of the deceased, who is also living outside New South Wales; the trust administration and the remainderman may be outside New South Wales; the limited interest may be surrendered or disposed of outside New South Wales; and the only connexion may be that the property has subsequently been brought into New South Wales before the death of the deceased. Their Lordships assume, however, that the property in which the limited interest was had can be clearly identified as being in New South Wales at the death of the deceased. If so, there is, in their judgment, a sufficient territorial connexion with New South Wales. It is the benefit derived through the property by the cesser of the life interest that is taxed, and if the property is inside the jurisdiction at the date of death it is immaterial what are the circumstances attendant on the creation and enjoyment of the limited interest. The presence of property within a State's jurisdiction has always been regarded as a cogent reason for recognizing the right and power to tax that property. The property enjoys the protection of the State's laws and, in their Lordships' judgment, fiscal legislation taxing that property can be regarded as a law for the peace, welfare and good government of that State.

Their Lordships were referred to several cases decided by the High Court of Australia dealing with this question. They find it sufficient to mention only two. In *Commissioner of Stamp Duties* (*N.S.W.*) v. *Millar*[5] a provision of the Stamp Duties Act of New South Wales (now repealed) imposed death duty on shares of any company, registered or incorporated within or without New South Wales and carrying on mining, or agricultural, or timber business in New South Wales, belonging to a deceased person. In the case in question the deceased had died resident and domiciled outside New South Wales and the company was incorporated out of and had no share register within that State. The court held by a majority of three to two that the enactment was not confined to companies whose sole business was in New South Wales and that the enactment was beyond the legislative power of the State. The shares held by the deceased could not be regarded as situate in New South Wales, and what was taxed was not the advantage to the deceased from the operations of the company in New South Wales but the whole value of the shares which might be due in part and, perhaps, entirely to operations conducted outside New South Wales. As expressed in the judgment of the majority, the legislature in taxing the share out of the jurisdiction had adopted [6] " a connexion which is " too remote to entitle its enactment to the description of a law " ' for the peace, welfare and good government of New South " ' Wales '. . . Or, to state the matter in another way, although " some connexion between the shareholder and New South " Wales may be discovered in the existence there of part of the " company's undertaking, the enactment goes beyond legislating " in respect of that connexion." In contrast with this decision is the decision in *Broken Hill South Ltd.* v. *Commissioner of Taxation (N.S.W.)* [7] where in the matter of certain income tax legislation of New South Wales it was held that income tax on a foreign company in respect of interest of money secured by mortgage of property in New South Wales was within the constitutional power of the State legislature. Lathem C.J. said [8]: " The circumstance in respect of which the law operates " must be something which really appertains to New South " Wales," and Dixon J. said [9]: " But it is within the com-" petence of the State legislature to make any fact, circumstance, " occurrence or thing in or connected with the territory the " occasion of the imposition upon any person concerned therein " of a liability to taxation or of any other liability." In their Lordships' opinion these judgments proceeded on right principle and are in accordance with the conclusion which their Lordships have reached in the present case. In this connexion their Lordships would also refer to a sentence in the speech of Lord Loreburn L.C. in *Winans* v. *Attorney-General*,[10] which was concerned with the imposition of estate duty under British legislation upon bearer bonds situate in the United Kingdom belonging to a foreigner domiciled abroad. Referring to property in the United Kingdom whether of a domiciled Englishman or of a foreigner, he said[11]: "In both cases the property received the "full protection of British laws—which is a constant basis of "taxation—and can only be transferred from the deceased to "other persons by the authority of a British court." This passage is as applicable to a subordinate legislature like that of New South Wales as to a supreme legislature like the British Parliament.

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[3] (1926) 38 C.L.R. 12.

[4] (1945) 71 C.L.R. 309.

[5] 48 C.L.R. 618.

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[6] 48 C.L.R. 618, 632.

[7] (1937) 56 C.L.R. 337.

[8] Ibid. 358.

[9] Ibid. 375.

[10] [1910] A.C. 27; 26 T.L.R. 133.

Lastly it was suggested that legislation that taxed property in the circumstances covered by paragraph (*g*) was contrary to the comity of nations. Their Lordships are aware of no comity that applies to such a case, even if such were a relevant consideration. But here also authority is against the appellants. In *Winans* v. *Attorney-General* Lord Atkinson said[12]: "There "does not appear, a priori, to be anything contrary to the "principles of international law, or hurtful to the polity of "nations, in a State's taxing property physically situated within "its borders, wherever its owner may have been domiciled at "the time of his death. That principle is not, however, acted "upon in the case of legacy and succession duties, wide as is "the language of the statutes imposing them. In these cases "the principle of mobilia sequuntur personam is applied." Lord Shaw of Dumfermline expressed himself to a similar effect[13]: "I know no reason" he says, "either under the law of nations, "by the custom of nations, or in the nature of things why "property within the jurisdiction of this country, possessed and "held under the protection of its laws, should not, upon transfer "from the dead to the living, pay the same toll which would "have been paid by property enjoying the same protection but "owned by a deceased British subject."

Cross-Appeal by the Commissioner of Stamp Duties

As already indicated, some of the personal property of the testator was outside New South Wales at the death of the deceased and the Supreme Court have held that this is not dutiable estate. The commissioner relies on the terms of section 102 (2A) as bringing this property into charge in respect that the deceased was, at the date of her death, domiciled in New South Wales. In their judgment the Supreme Court say: " In our " opinion the suggested nexus is completely irrelevant and, con- " sequently, in so far as section 102 (2A) purports to extend the " operation of the paragraph (*g*) it is, we think, invalid." In their Lordships' opinion the Supreme Court arrived at a right conclusion.

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[11] [1910] A.C. 30.

[12] Ibid. 31.

[13] Ibid. 48.

The case is not that of a deceased dying possessed of personal estate, or a case of a deceased who has given away property shortly before his death without valuable consideration. The deceased's only interest was a limited interest ceasing on her death, and it is not her estate that is brought into charge. If the presence of the property in the State at the death of the deceased is lacking, every other incident or circumstance associated with the limited interest may also find its place, as has already been exemplified, outside New South Wales. The domicile of a deceased within New South Wales at the date of his death is, in their Lordships' judgment, a quite insufficient ground by itself to make good the lack of any other connexion with the State. In the succinct language of the Supreme Court: " The case may be exemplified as being one in which a " duty is levied on or in respect of the property of A because of " the domicile in the jurisdiction of B."

The Solicitor-General referred to other sections of the Act, and particularly to sections 5, 114A, 115A and 120, to show that the legislature contemplated exacting the duty only against the property, or from the person vested in the property, if within the jurisdiction, and that accordingly the provisions of subsection (2A) were not in their practical effect so drastic as to be beyond State competence. But no enactment can be enforced without effective jurisdiction to do so and to make a virtue of necessity cannot save a bad enactment. The enactment must be valid before it can be enforced.

Reliance was next placed on section 144 of the Act, to save subsection (2A) in its application to paragraph (*g*), in those cases where some other element than domicile was present which would give a sufficient nexus with the State, such as the presence of the remainderman, or person in whom the property was vested, within the State. Section 144 runs as follows: " This Act shall " be read and construed so as not to exceed the legislative power " of the State to the intent that where any enactment thereof " would, but for this section, have been construed as being in " excess of that power, it shall nevertheless be a valid enactment "to the extent to which it is not in excess of that power." Similar clauses have been considered in numerous cases in the Commonwealth and State Courts of Australia and in the United States of America. It has been said that they reverse the presumption that the legislature intended its will on any particular matter as expressed in the statute to operate in its entirety and had no intention that something less should be law. So legislation found partially invalid must be treated as distributable, or divisible, unless it appears affirmatively that it was not part of the legislative intention that so much as might have been validly enacted should become operative without what was bad (*The King* v. *Poole*, *Ex parte Henry* (*No.* 2),[14] *per* Dixon J.). Reliance was placed on two cases where this distributive or divisible principle was applied. In *Carter* v. *Potato Marketing Board*[15] a Queensland statute imposed a penalty on anyone who, inter alia, received potatoes from any person other than the Potato Marketing Board. The transaction in that case was carried out wholly in Queensland and it came under the words of the enactment. The validity of the enactment was challenged as being an attempted impairment of the freedom of trade, commerce and intercourse among the States in respect that the general language of the enactment, given a literal application, would include transactions of inter-state commerce. The statute, however, included a provision corresponding to section 144, and it was held that the enactment was capable of receiving distributive effect so as to be valid in respect of intra-state trade though it would be bad in so far as it interfered with inter-state trade. A similar decision was reached in *Newcastle and Hunter River Steamship Co. Ltd.* v. *Attorney-General for the Commonwealth*[16] in upholding the validity of a Commonwealth Navigation Act, in so far as it affected ships engaged in inter-state and foreign trade, though in so far as it prescribed for ships engaged in domestic trade within the confines of one of the constituent States it was in excess of the power of the Commonwealth Parliament.

In their Lordships' opinion these cases are distinguishable. The elements of divisibility or distributiveness lay within the framework of the enactments. The enactments applied to all transactions of a particular kind and to all persons who engaged in such transactions, or prescribed requirements for all ships of defined categories. In certain cases coming within the enactments no objection could be taken to the validity of the legislation if these had been the only type of case to which the enactment applied, though in other types of cases the enactment would be bad. In the present case there is no scope for the application of any such distributive principle. The enactment prescribes for only one thing, the imposition of duty on property outside New South Wales where the deceased dies domiciled in that State and the property would be liable if it were inside New South Wales. There is no way of splitting that up into good and bad in its application to paragraph (2) (*g*). It is wholly bad. It applies solely to property outside New South Wales which, ex hypothesi, the domicile of the deceased in New South Wales is insufficient of itself to subject to charge. To invoke the presence in New South Wales of the person liable to the duty, in order to save the enactment in part, is to bring in something from outside the enactment, to write the enactment up rather than to read it down. This is a provision to confer taxing jurisdiction and it is not legitimate to introduce into the subsection, to eke out its deficiencies, factors which are not already there. That, in the Lordships' judgment, is not a permissible way of applying section 144. In their Lordships' judgment the cross-appeal accordingly fails.

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[14] (1939) 61 C.L.R. 634, 651.

[15] (1951) 84 C.L.R. 460.

[16] (1921) 29 C.L.R. 357.

Appeal by Brady's Trustee

This is also a paragraph (*g*) case. It differs from the case of Johnson's trustees in that the whole property of the testator was at the death of the holder of the limited interest situated in New South Wales. It also differs in that the person in enjoyment of the limited interest (as to the whole of the testator's estate) died domiciled in England, though leaving property in New South Wales, and that some of the remaindermen are domiciled outside New South Wales. These latter differences do not affect the principles on which the case falls to be decided. The Supreme Court held that all the property of the testator was liable to duty, being all situated in New South Wales, and, for the reasons already given, their Lordships are of opinion that the Supreme Court were right.

Appeal by Forster's Trustees

The relevant facts here are similar to those in *Johnson's* case except that all the property of the testator was at the death of the holder of the life interest situated in New South Wales. It

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follows that the whole of the property of the testator is liable to duty, as the Supreme Court has held.

The Board will humbly advise Her Majesty in the case of Johnson's trustees that the appeal and the cross-appeal should both be dismissed; and that in the cases of Brady's trustee and Forster's trustees the respective appeals should be dismissed. The appellants in the appeal and cross-appeal in the first of these cases must bear the costs of their respective appeals. The appellants in the other two cases must also pay the costs of their appeals, but their Lordships direct that, on taxation, these appellants' costs shall not be increased by the fact that at the hearing the appeal and the cross-appeal in the first case were heard at the same time.

Solicitors: *Bell, Brodrick & Gray; Light & Fulton.*

J. C.*
1956
Mar. 8.

KAI NAM (A FIRM) . . . . . . APPELLANTS;

AND

MA KAM CHAN . . . . . . RESPONDENT.

[AND CONNECTED APPEALS.]

ON APPEAL FROM THE APPEAL COURT OF HONG KONG.

Hong Kong—Landlord and tenant—Business premises—Claim to possession—"Entirely new buildings"—Excluded from operation of Act—Test of "new building"—Estoppel—Cannot be founded on representation of law—Landlord and Tenant Ordinance (Hong Kong), No. 25 *of* 1947, *s.* 3 (1) (*a*).

Estoppel—Conduct, by—Law, representation of—Cannot found estoppel—Landlord and tenant. Landlord and tenant.

The appellants were the tenants respectively of a number of temporary one-storey shop premises in Hong Kong which had been erected, after the passing of the Landlord and Tenant Ordinance, 1947, on the site of a four-storeyed dwelling-house which had been almost completely demolished by enemy action during the late war. In building the shops almost the whole of the old foundation of the former building was retained and also the lower part of the old walls to an average height of three bricks above ground level;

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* *Present*: LORD OAKSEY, LORD TUCKER, LORD COHEN, LORD KEITH OF AVONHOLM and MR. L. M. DE SILVA.

the old drains were used, the old concrete flooring was largely retained and also most of the old lavatories. The new walls were not as thick as the old, being of the thickness of one brick only. The plan of the floor was the same as the old ground floor.

The respondent landlord of the shop premises, having given notice to the tenants terminating their contractual monthly tenancies then subsisting, began proceedings claiming possession and alleged that the premises were "entirely new" buildings and excluded from the operation of the Landlord and Tenant Ordinance, 1947, which, by section 3 (1) (*a*), provided expressly that the Ordinance should not apply to "any entirely new building." The appellants, who relied on the provisions of the Ordinance, contended that the shop premises did not constitute entirely new buildings within the meaning of section 3 (1) (*a*), and that in any event the respondent was estopped from asserting to the contrary by having served notices of increase of rent under the Ordinance on which the appellants had acted:—

Held, (1) that the respondent was not estopped by having served notices of increase of rent purporting to have been made under the Ordinance and receiving such increased rent. If the documents relied on could be regarded as containing representations, such representations were representations of law, not of fact, and could not found an estoppel.

Territorial and Auxiliary Forces Association of the County of London v. *Nichols* [1949] 1 K.B. 35; 64 T.L.R. 438; [1948] 2 All E.R. 432 applied.

(2) That the shop premises were "entirely new buildings" within the meaning of section 3 (1) (*a*) of the Ordinance and excluded from its operation. Where the damage had been so extensive that repair was impossible, when there was nothing left which could possibly be called a building, then the existence of that building as such was terminated and a building replacing it would be an entirely new building even though it was built on the same foundations and had the same floor as the old one. The words "entirely new" in section 3 (1) (*a*) were used in relation to the building and not to the materials of which it was composed, and the correct test to be applied was whether the old building was so far beyond repair that it could no longer be said to exist as a building.

Orders of the Court of Appeal of Hong Kong affirmed.

CONSOLIDATED APPEALS (No. 7 of 1955) from six orders of the Full Court of the Supreme Court of Hong Kong (Appellate Jurisdiction) (July 2, 1954) by which they allowed six appeals against an order of the District Court of Hong Kong (April 8, 1954), which had rejected the present respondent's claims for possession of certain premises and dismissed his actions.

The following facts and statutory provisions are taken from the judgment of the Judicial Committee: The appellants were respectively tenants of premises known as Nos. 1, 5, 7, 13, 15 and 17, Landale Street, Victoria, in the Colony of Hong Kong. The respondent was the landlord of such premises. On October 19, 1953, the respondent gave notice to each of the appellants terminating his contractual monthly tenancy then subsisting. On December 16, 1953, the respondent commenced proceedings against each of the appellants, claiming possession and mesne profits from December 1, 1953. The six actions were heard together by Wicks D.J. on December 24, 1953. The appellants relied on the provisions of the Landlord and Tenant Ordinance (No. 25 of 1947) (hereinafter referred to as "the Ordinance"). The respondent contended that each of the premises occupied by the appellants was excluded from the operation of the Ordinance as being "an entirely new building" within the meaning of section 3 (1) (*a*) of the Ordinance. The appellants argued that it was not open to the respondent to advance that contention since he was estopped from doing so by serving notices of increase of rent under the Ordinance on which the appellants had acted. The District Judge rejected that argument, but he also rejected the respondent's contention that each of the buildings was "an "entirely new building." Accordingly, he dismissed each of the actions with costs.

The respondent appealed to the Supreme Court of Hong Kong (Gould Ag.C.J. and Gregg J.). The appeals were heard together, and on July 2, 1954, judgment was delivered allowing the appeal, the court holding that each of the buildings was "an entirely "new building" within the meaning of section 3 (1) (*a*) of the Ordinance.

From that decision the appellants appealed to the Board, the appeals being consolidated.

By section 3 (1) of the Ordinance: "This Ordinance shall not "apply to—(*a*) any entirely new building in respect of which the "written permit of the building authority to occupy the same "shall have been granted under the provisions of section 137 of "the Buildings Ordinance after 16th day of August, 1945; . . ."

Other provisions of the Ordinance to which reference was made in one or other of the judgments in the Hong Kong courts were:

Section 3 (1) (*b*) exempted from the provisions of the Landlord and Tenant Ordinance premises continuously untenanted since August 16, 1945, which had been rendered habitable at the expense of the landlord since May 23, 1947, by repairs "wholly "necessary for rendering the premises reasonably habitable" and at a cost of not less than seven times the standard rent for one year.

Section 3 (1) (*c*) exempted from the operation of the Ordinance business premises let for a term of not less than five years. Section 13 saved the validity of new agreements to vacate premises, and section 18 enabled a tenancy tribunal established pursuant to the Ordinance to give effect to agreements the validity of which was saved under section 13. Section 31 empowered the Governor in Council by order to exclude any premises or class of premises from the operation of the Ordinance.

The Ordinance contained no definition of " building " or of " new building " or of " entirely new building." It contained, however, more than one reference to the Buildings Ordinance (No. 18 of 1935). In particular, section 3 (1) (*a*) referred to section 137 of the Buildings Ordinance. Subsection (1) of that section was in the following terms:

" 137. (1) No new building shall be occupied or used in any " way, except by caretakers only not exceeding two in number, " until an authorized architect shall have certified in writing in " the prescribed form to the Building Authority that such building " complies in all respects with the provisions of this Ordinance, " and is structurally safe, nor until the owner shall have received " from the Building Authority a written permit to occupy such " building."

Section 2 of the Buildings Ordinance contained the following definitions:

" In this Ordinance—. . . ' new building ' includes any build- " ing begun after the 21st day of February, 1903; and any then " existing building thereafter altered to such an extent as to " necessitate the reconstruction of the whole of any two of its " main walls or the removal of the roof and the reconstruction " of at least one half of each of any two of its main walls, whether " at the same time or by instalments at different times; and any " existing building raised to such an extent that its total height " exceeds one and a half times the original height of the building. " It also includes the conversion into a domestic building of any " building not originally constructed for human habitation, and " the conversion into more than one domestic building of a " building originally constructed as one domestic building only " and any existing building altered in such a manner as to form " an additional storey, or the conversion into premises, for " separate occupation by different tenants, of any building " originally constructed for one tenancy.

" ' building ' includes any part of a domestic building, house, " school, shop, factory, workshop, bakery, brewery, distillery, "pawnshop, warehouse, godown, place of secure stowage, "verandah, balcony, kitchen, latrine, gallery, chimney, arch, "bridge, stair, column, floor, out-house, stable, shed, pier, "wharf, fence, wall, roof, covered way, canopy, kiosk, sunshade, "garage, well, piling, septic tank, cow-shed, lift and hoarding."

These were the statutory provisions which had to be considered in relation to the facts of the present case. Those facts were not in dispute and were accurately summed up by Gould Ag.C.J. as follows: "There is little or no dispute about the essential "facts. Before the Pacific war, the site was occupied by a four "storey building intended for residential purposes. During the "war, in common with adjoining premises, they suffered damage "amounting to almost complete demolition. After the passing "of the Landlord and Tenant Ordinance, the then owner obtained "permission from the Public Works Department to erect temporary one storey premises for use as shops. When building "operations commenced debris was piled on the site and only "after it was cleared away was the exact position of the existing "foundations disclosed. In the new construction, almost the "whole of the old foundation was retained, and also the lower "part of the old walls to an average height of three bricks above "ground level. The old drains were used, the old concrete "flooring was largely retained and also most of the old lavatories. "The new walls were not as thick as the old, being of the thickness of one brick only. The plan of the floor was the same as "the old ground floor though there was a slight increase of "internal area owing to the thinner walls."

An occupation certificate in respect of the new construction was issued on October 7, 1947, under the provisions of section 137 of the Buildings Ordinance.

1956. Feb. 13, 14. *Viscount Hailsham Q.C.* and *John Wilmers* for the appellants. The sole question is whether the appellants are entitled to the benefit of the Landlord and Tenant Ordinance, 1947. If they are, it is submitted that their appeal succeeds; if they are not, then it is conceded that it fails. They raise two alternative points: (1) Are the premises "entirely new "buildings" within the meaning of section 3 (1) (*a*) of the Ordinance? If they are, the appellants fail; if they are not, then they succeed. If they are wrong about that, (2) is the landlord, by reason of the fact that he served notices of increase of rent on the appellants under the Ordinance, which they have paid, estopped from denying the application of the Ordinance to the premises? If he is so estopped, then again the appellants would succeed.

On the first question, when the shop premises were erected almost the whole of the foundations of the old building, and the lower part of the old walls to an average height of three bricks above ground level, were retained, the old drains and the old concrete flooring were used, and most of the old lavatories were retained. The shop premises were not " entirely new buildings " within the meaning of section 3 (1) (*a*). The words " entirely " new " are really so plain that they must be given their ordinary meaning. The Buildings Ordinance, 1935, contains a definition of a " building " and a " new building," but the phrase to be interpreted here is " entirely new building," and there is no definition in the Landlord and Tenant Ordinance of " new building " or " entirely new building." An " entirely new building " means new in all its parts; that is its dictionary meaning and its natural and ordinary meaning. It does not follow that if a building is destroyed beyond repair it does not exist at all—that is fallacious.

Lurcott v. *Wakely & Wheeler*,[1] to which the Appeal Court below referred, and from which, it is submitted, they really drew the wrong moral, can give no assistance here. The doctrine that a tenant under a covenant to repair is not liable if the building wears out from old age, but is liable if the building is extensively damaged or destroyed by fire or bomb, can give no kind of help to either party in the present case. *Lurcott's* case [1] deals with a branch of the law so very different that it is only accidentally that some of the words are applicable at all. [Woodfall on Landlord and Tenant, 24th ed., pp. 699 and 709, was also referred to.] When the words are an " entirely new building " it is no longer a question of degree; it may be that the legislature deliberately intended to take the matter out of degree. [The definition of " entire " and " entirely " in the Oxford Dictionary was referred to.] There is a large number of cases which deal with the expression " new building " under various English building statutes, but they really have as little to do with the words " entirely new building " in the Ordinance as has the definition of " new building " in the Buildings Ordinance. *James* v. *Wyvill* [2] shows that " new building " is treated as a question of degree and fact, but where, as here, the words are " entirely " new building," it ceases to be a question of degree at all. This is not de minimis—all the features in the present case, foundations, floors, drains, etc., if incorporated in a new building prevent it from being an " entirely new building."

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[1] [1911] 1 K.B. 905.

[2] (1884) 51 L.T. 237.

Under the English Rent Acts there is a large number of cases which all appear to depend either on the phrase " separately let " as a dwelling-house " or " first erected as a dwelling-house," but those are not the same as the words to be construed here: *Rex* v. *Sidmouth Rent Tribunal, Ex parte Sellek.*[3] One comes back every time to the actual words of the Ordinance and nothing else will help, and one cannot get a better reading of " entirely " new " than new in all its parts. The words should be given their plain grammatical meaning.

With regard to the estoppel point; as provided by the Ordinance, the landlord serves a notice of increase of rent, and if the tenant does not pay the increased rent he can either be evicted for non-payment of rent or he can be sued for arrears of the increased rent. It is a representation that the premises come within the Ordinance and that they are controlled by it, and a landlord cannot after so acting and taking the benefit be heard to say that the tenancy is not within the Ordinance at all. *Langford Property Co. Ltd.* v. *Goldrich,*[4] which was relied on by the courts below as conclusive, is, it is submitted, nothing of the kind —this point is dealt with only in the All England Reports. The first reference against the appellants is *Territorial and Auxiliary Forces Association of the County of London* v. *Nichols,*[5] which shows that a representation of this kind is only a representation of law and not of fact. A representation of law cannot be the subject of an estoppel. If there is a combined representation of law and fact, then in so far as it contains a representation of fact the party making the representation can be estopped notwithstanding that it involves a proposition of law as well. By serving a notice of this kind it is of both kinds—law and fact. [Reference was also made to *Harnam Singh* v. *Jamal Pirbhai.*[6]]

Charles Russell Q.C. and *A. A. Baden Fuller* for the respondent. The correct approach to the main question is, first, that the background of this Ordinance includes the need to encourage building by landlords, by enabling them in appropriate cases to demand an economic rent. The definition of " new building " in the Buildings Ordinance includes, inter alia, existing buildings altered, raised or converted. The purpose of the inclusion of the word " entirely " in section 3 (1) (*a*) of the Landlord and Tenant

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[3] [1951] 1 K.B. 778; [1951] 1 T.L.R. 408; [1951] 1 All E.R. 107.

[4] [1948] 2 All E.R. 439.

[5] [1949] 1 K.B. 35; 64 T.L.R. 438; [1948] 2 All E.R. 432.

[6] [1951] A.C. 688, 698.

Ordinance is because without it the words used, simply "new "building," would have pointed to the inclusion in this exemption from rent control of buildings which had been merely converted, raised or altered, and that was not intended by the subsection. The function of "entirely" is to exclude from section 3 (1) (*a*) what would otherwise clearly be taken to be included. So one is not to consider the phrase "entirely new building" divorced from that context, but as a phrase one part of which is designed to exclude substantial alterations to an existing building.

It was argued for the appellants that "entirely" must show the whole with no part excepted, or every part. But that simple argument breaks down immediately it is conceded, as it is, that a building which incorporates second-hand tiles can be an entirely new building for the purposes of this Ordinance. In a sense it is a question of degree, but not wholly so. It was also argued that a building cannot be an entirely new building if it incorporates second-hand materials, however small in extent, which formed part of the previous building and had not been moved. That is the only test which is put forward to distinguish a case of some use of second-hand materials. It would be very remarkable if the accident of whether a portion of the previous building was moved should decide whether or not it was an "entirely new "building," and that is implicit in the test which is suggested by the appellants' argument and is the test on which the whole of their case really rests.

The respondent's whole position is this: nobody walking down Landale Street in 1946 could possibly say that there was a building there, and if there was not, then on the true construction of this Ordinance the buildings there now are entirely new buildings. Take the illustration given by the Appeal Court below—the party wall—one could not say that a whole party wall was de minimis. This can fairly be described as an entirely new building. The broad test for which the respondent contends must lead to far less absurdity than the view put forward for the appellants. For the purposes of the Landlord and Tenant Ordinance nobody could possibly say, looking at that vacant site, "Look at that building." Nobody could suggest that it could come under section 3 (1) (*b*) as something which required only extensive repairs; section 3 (1) (*b*) could not possibly apply to the activities which produced the buildings now in question.

The first and shortest answer to the estoppel point is that if there was a representation it was a representation that the Landlord and Tenant Ordinance applied to the premises, and that is simply a representation of law. In the *Territorial and Auxiliary Forces Association* case [7] it was held quite plainly that such a representation of law is not a foundation for estoppel. Also, estoppel ought to be pleaded precisely. Further, no acting on the particular representation is proved; all that is proved is that the appellants paid the increased rent which was demanded; it is not proved that they paid it because the demand included a reference to the Landlord and Tenant Ordinance. There is no evidence that they acted on the particular representation complained of, and no evidence that they acted to their detriment. Finally, on estoppel, it is submitted that it is perfectly correct to say that not only can one not contract out of an Act such as this by contract or estoppel, but one cannot contract in by contract or estoppel. [Reference was made to Spencer Bowen on Estoppel by Representation, 1923 ed., p. 187, para. 220.] That is the general principle, which is supported by *Dutton* v. *Sneyd Bycars Co. Ltd.*[8]; this point covers a representation of fact acted upon to the detriment; it is an overall point which would prevent the creation of an estoppel in any event. [*J. & F. Stone Lighting and Radio Ltd.* v. *Levitt* [9] and *Harnam Singh* v. *Jamal Pirbhai* [10] were also referred to.]

Viscount Hailsham Q.C. in reply. It is not necessary to rely on the policy underlying the Ordinance if the words of the Ordinance are, as it is submitted they are, clear. The Board should apply what is described in Maxwell on Interpretation of Statutes, 9th ed., p. 3, as "The first and most elementary rule of construction is that it is to be assumed that the words and phrases of technical legislation are used in their technical meaning if they have acquired one, and, otherwise, in their ordinary meaning." This case is ultimately one of those cases. "Entirely" has by definition no other meaning than complete in and in reference to all its parts. The maxim de minimis cannot be applied; even if it were a question of degree, the remaining parts of the old building form a substantial part of the new building. "Entirely new" are free from ambiguity, free from the Buildings Ordinance, and in the long run the appellants' case merely rests on the ordinary meaning of the words.

March 8. The judgment of their Lordships was delivered by Lord Cohen. Gould Ag.C.J., who delivered the leading judgment in the Supreme Court, did not deal expressly with the issue of estoppel, but assuming it to have been raised before the Supreme Court they must be taken to have rejected it, since they would not otherwise have allowed the appeal.

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[7] [1949] 1 K.B. 35, 48.

[8] [1920] 1 K.B. 414.

[9] [1947] A.C. 209; 62 T.L.R. 737; [1946] 2 All E.R. 653.

[10] [1951] A.C. 688.

Both questions which were discussed by the District Judge were ventilated before their Lordships. It will be convenient first to dispose of the question of estoppel.

On this point their Lordships agree with the Hong Kong courts that the respondent is not estopped by having served notices of increase of rent purporting to be made under the Ordinance and receiving such increased rent. It is sufficient to observe that if the documents relied on can be regarded as containing representations, such representations are representations of law, not of fact, and cannot found an estoppel. See *Territorial and Auxiliary Forces Association of the County of London* v. *Nichols.*[1]

Their Lordships therefore turn to the more difficult question whether the premises occupied by the appellants can properly be held to be entirely new buildings within the meaning of section 3 (1) (*a*) of the Ordinance. That section provides as follows: [His Lordship stated the terms of the relevant statutory provisions set out above, stated the facts, and continued:] On those facts can the premises in question be said to be entirely new buildings? The District Judge answered this question in the negative. He appears to have relied to some extent on the definition of "building" in section 2 of the Buildings Ordinance, but their Lordships agree with the Supreme Court of Hong Kong that this definition is in such wide terms that it is not of any assistance in the solution of the problem. Their Lordships also agree with the Supreme Court that although an "entirely new "building" for the purpose of the Ordinance must necessarily fall within the class of buildings which the Buildings Ordinance regards as a new building, it is obvious from the definition of new building in the Buildings Ordinance that every new building within that definition is not necessarily an entirely new building for the purposes of the Ordinance. Their Lordships agree with Gould Ag.C.J. that the word "entirely" was probably included in section 3 (1) (*a*) of the Ordinance to make it quite clear that the definition of "new building" in the Buildings Ordinance did not apply. For these reasons their Lordships consider that the meaning of the phrase "entirely new building" must be ascertained from the provisions of the Ordinance.

[1] [1949] 1 K.B. 35; 64 T.L.R. 438; [1948] 2 All E.R. 432.

The District Judge held that since the existing structures included almost the whole of the foundations and concrete floors and an average of three bricks above ground level, the word "entirely" made it impossible to say that the new structure was an entirely new building. He went on to refer to sections 3 (1) (*b*), 3 (1) (*c*), 13 and 18 (1) (*c*) and 31 of the Ordinance and said that the opportunities offered by those sections afforded sufficient opportunity of protection to the respondent and made the result at which he arrived reasonable.

Their Lordships are unable to agree. Like the Supreme Court, they think that bearing in mind the obvious purpose of section 3, which was to encourage new building, it would be strange if a big gap was left unfilled between rebuilding, which would bring the new structure within section 3 (1) (*a*), and extensive repairs, which come within section 3 (1) (*b*). In the case of temporary structures such as those occupied by the appellants that gap could not be satisfactorily filled by section 3 (1) (*c*).

In their Lordships' opinion the District Judge laid too much stress on the word "entirely" and paid insufficient attention to the words "new building" and to the distinction between a building and the materials of which it is composed. They agree with Gould Ag.C.J. that "where the damage has been so "extensive that repair is impossible, when there is nothing left "which could possibly be called a building, then surely the "existence of that building as such is terminated" and that "a building replacing it would be an entirely new building even "though it was built on the same foundations and had the same "floor" as the old one.

In the course of his judgment Gould Ag.C.J. called attention to the absurdity that would arise on the construction adopted by the District Judge if all that survived of the old building was a party wall. The erection on the site of a newly built house which used the party wall could not be described as the execution of repairs and therefore could not come within section 3 (1) (*b*). Yet on the basis of the argument addressed to this Board by Lord Hailsham and accepted by the District Judge section 3 (1) (*a*) would not apply to the new house.

Their Lordships agree with the Supreme Court that the words "entirely new" in section 3 (1) (*a*) are used in relation to the building and not to the materials of which it is composed, and that the correct test to be applied is whether the old building was so far beyond repair that it could no longer be said to exist as a

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building. This construction does not do violence to the meaning of the phrase under consideration and avoids such absurdities as their Lordships have mentioned.

The application of this test to the facts of a particular case must always involve a question of degree. On the facts of the present case their Lordships agree with the Supreme Court that the structures occupied by the appellants are entirely new buildings within the meaning of section 3 (1) (*a*) of the Ordinance.

For these reasons their Lordships will humbly advise Her Majesty that the appeal should be dismissed. The appellants must pay the respondent's costs of the appeal.

Solicitors: *Reid, Sharman & Co.; Gibson & Weldon.*

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Feb. 6.

NATIONAL MUTUAL LIFE ASSOCIATION OF AUSTRALASIA LTD. . . . . APPELLANT;

AND

ATTORNEY-GENERAL FOR NEW ZEALAND RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NEW ZEALAND.

Currency—Contract—Government stock—New Zealand—Inscribed stock —Interest and principal payable at Melbourne "free of exchange" —No option to change place of payment—Obligation discharged by payment of face value in Australian pounds.
New Zealand.

The appellant was the holder of 5½ per cent. inscribed stock and bearer debentures, totalling £526,500, issued by the New Zealand Government under the State Advances Act, 1913, in the years 1925 and 1926, and maturing on February 1, 1951. The stock was issued for a certain number of "pounds" and was payable as to interest and repayable as to principal at Melbourne "free of "exchange." The bearer debentures were expressed each to be for "five hundred pounds Sterling" and payable as to interest and capital at Melbourne. There was no option to change the place of payment of interest or capital of either the stock or debentures. At the time when the securities were issued New Zealand currency was at parity with Australian currency, but from August, 1948, £A.125 was the equivalent of £N.Z.100. Thereafter interest on the

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* *Present*: VISCOUNT SIMONDS, LORD OAKSEY, LORD REID, LORD KEITH OF AVONHOLM, LORD SOMERVELL OF HARROW.

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stock and debentures and, on maturity, the principal, was paid at the nominal or face value measured in Australian currency or money of account. The appellant, alleging that the indebtedness of the New Zealand Government could only be discharged by payment of the nominal or face value of the several obligations in New Zealand currency or its equivalent in Australian currency in Melbourne at the current rate of exchange applicable as at the date of each payment, claimed sums of money for short paid principal and interest. It was admitted that the monetary systems of New Zealand and Australia were different and that even while they were of the same value the New Zealand pound and the Australian pound were different units. It was also admitted that the proper law of the contracts was that of New Zealand:—

Held, that all payments which had to be made in Melbourne must be made in Australian currency, and the stipulation that they were to be made there "free of exchange" meant from the beginning—and taking into account the presumption stated in *Bonython* v. *Commonwealth of Australia* [1951] A.C. 201; 66 T.L.R. (Pt. 2) 969 that the "Government of a self-governing "country, using the terms appropriate to its own monetary system, "must be presumed to refer to that system whether or not those "terms were apt to refer to another system also"—that the rate of exchange between the two currencies at the time when any payment became due was to be disregarded in determining the amount of Australian currency payable. Accordingly, the obligation of the New Zealand Government was to repay in Melbourne in Australian currency a number of pounds equal to the face value of the stock, irrespective of whether the New Zealand pound was worth more or less in Australia than the Australian pound.

Bonython v. *Commonwealth of Australia* (supra), *Adelaide Electric Supply Co.* v. *Prudential Assurance Co.* [1934] A.C. 122; 50 T.L.R. 147 and *National Bank of Australasia Ltd.* v. *Scottish Union and National Insurance Co. Ltd.* [1952] A.C. 493; [1952] 2 T.L.R. 254 considered.

Judgment of the Supreme Court of New Zealand [1954] N.Z.L.R. 754 affirmed.

APPEAL (No. 2 of 1955) from a judgment of the Supreme Court of New Zealand (May 31, 1954).

The appellant was on and before February 1, 1951, being the maturity date thereof, the holder of certain parcels of inscribed stock and certain bearer debentures issued by the New Zealand Government under the State Advances Act, 1913, in the years 1925 and 1926 and having an aggregate nominal or face value of £526,500. The inscribed stock was issued for a certain number of "pounds" and was payable as to interest and repayable as to principal at Melbourne, Australia, "free of exchange." The bearer debentures were each expressed to be for "five hundred "pounds Sterling" and were respectively payable and repayable as to interest and principal at Melbourne. At the time when the securities were issued New Zealand currency was at parity with Australian currency, but from August 20, 1948, £A.125 was equivalent to £N.Z.100.

From and after August 20, 1948, the New Zealand Government continued to pay to the appellant at Melbourne interest at the rate specified in the securities on the nominal amount thereof in Australian currency, and, likewise, on the maturity date repaid to the appellant at Melbourne the nominal amount of the principal specified in the securities in Australian currency.

The appellant, in accepting those payments of interest and principal, expressly reserved the right to claim that the obligations of the New Zealand Government were measurable in the money of account of New Zealand, and on August 4, 1953, commenced against the respondent in the Supreme Court of New Zealand the action out of which this appeal arose. claiming alleged short payments of principal and interest. The relevant facts are stated fully in the judgment of the Judicial Committee.

The Supreme Court of New Zealand (Fair, Hay and North JJ., Gresson and Stanton JJ. dissenting) adjudged and ordered that the appellant should recover nothing against the respondent.

1955. Nov. 1, 2, 3, 7, 8 and 9. *Sir Garfield Barwick Q.C.* and *R. I. Threlfall* for the appellant. It is common ground between the parties that the proper law of the contract is the law of New Zealand; the proper law of the antecedent contract for the issue of the stock was also that of New Zealand. It is also common ground that at all material times the currency of New Zealand has been distinct and separate from that of Australia. The two systems have used common terminology to describe the units of currency. Those units exchanged at par at the time of the issue of the stock, but had diverged in exchange value by 1948, £N.Z.100 thereafter exchanging for £A.125. The appellant claims that the obligation was to pay in New Zealand currency at the face value; the respondent contends that the currency of the obligation is Australian and claims that the face value of Australian currency discharges the obligation.

The propositions for which the appellant contends are: (1) The distinction between the obligation and the manner of performance must be maintained throughout. (2) The question here concerns the measure of the obligation. (3) The precise question is this: in what currency is the obligation on the inscribed stock expressed? (4) The stock is transferable and may be transferred by mere delivery, i.e., by negotiation of the stock certificate. (5) The question is to be answered by the construction of the instrument creating and the instrument evidencing the obligation. The obligation comes out of the Inscribed Stock Act, 1917. (6) Therefore, the terms of any antecedent contract for the issue of the stock, the source of the original investor's money, his identity, his place of residence or business, and his particular intention when investing in or purchasing the stock are all alike irrelevant to the construction of the instrument which creates the obligation. (7) The obligation on the stock is to be found in the combination of the Inscribed Stock Act, 1917, and the inscription on the register of inscribed stock, and possibly the certificate of title, if any. So the claim which the appellant must have is the claim which the statute gives it on the revenues by virtue of inscription. Thus the obligation is very strictly a statutory obligation. (8) The Inscribed Stock Act, 1917, and the maintenance of the register under it require the inscription to be expressed in pounds. (9) The stock in this respect—in that it must be expressed in pounds—is necessarily uniform, e.g., the amount to be entered is in multiples of pounds. (10) The conclusion from that is that in the New Zealand statute and in the New Zealand register kept under it with respect to uniform inscribed stock pounds are necessarily New Zealand pounds. (11) The ability of the Minister to make the principal repayable anywhere supports the view that in the circumstances of this statutory scheme the obligation is expressed in New Zealand pounds. (12) Further, the amount of stock which may be issued at any time is limited by an authority necessarily expressed in New Zealand pounds. That is to say, the total obligation which may be assumed is expressed in New Zealand pounds, and therefore the individual obligations which make up the total must be similarly expressed. (13) The factors in the construction of the obligation are these: (i) New Zealand is the proper law; (ii) the claim is statutory and the obligation is statutory; (iii) it is an obligation of a Dominion Government charged upon its revenues; and (iv) the terms of the statute and the statutes which are necessarily linked with it. (14) A construction which would place the obligation of the contract within the jurisdiction of the foreign legislature is unacceptable.

With regard to the authorities, the general comment on *Adelaide Electric Supply Co.* v. *Prudential Assurance Co.*[1] is that it proceeded on the assumption that there was only one and the same money of account in Australia and England; and see also

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[1] [1934] A.C. 122; 50 T.L.R. 147.

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Broken Hill Pty. Co. v. *Latham.*[2] It can at least be claimed that there is no steady course followed in the judgments in the *Adelaide* case,[3] *Auckland Corporation* v. *Alliance Assurance Co.*[4] and *Mount Albert Borough Council* v. *Australasian Temperance and General Mutual Life Assurance Society.*[5] If it be right to say, as is submitted, that the inscribed stock was uniform, then *Bonython* v. *Commonwealth of Australia* [6] fits the appellant's case here exactly; *Bonython's* case [6] calls attention throughout to the difference between obligation and performance. *National Bank of Australasia Ltd.* v. *Scottish Union and National Insurance Co. Ltd.*[7] maintains that distinction but does not bear very directly on the present case. [Reference was also made to *Goldsbrough Mort & Co. Ltd.* v. *Hall* [8] and to *Bonython's* case before the High Court.[9]]

Summarizing the effect of the nomination of the place of payment, it is submitted that the cases show: (1) That the determination of the substance of the obligation by the place of payment is the exception rather than the rule. (2) That it is only in the last resort and in default of any other factor by which it can be resolved that the place of payment will determine the substance of the obligation. (3) Prima facie, the place of payment is for the mere convenience of the payee. (4) Where an obligation may be performed by payment in more than one place, the place of payment cannot determine the substance of the obligation. (5) The statute in this case—the Inscribed Stock Act—contemplates that there may be many places for payment of the obligation contained in the stock. (6) The statute also contemplates that the place of redemption of the stock may be changed at the request of the holder. (7) The conclusion is that in this case the place of payment is merely for the convenience of the holder and does not bear on the substance of the obligation.

It is a straight question of construing what the instrument is with the statute which authorizes it. The claim the appellant asserts is that which the stock gives it, and that derives (a) from the inscription of its name on the register, and (b) the statute.

On the meaning of "free of exchange," Gresson J. in his judgment in the Supreme Court said: "The expression 'free "'of exchange' is susceptible of meaning, unaffected by the

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[2] [1933] Ch. 373; 49 T.L.R. 137.

[3] [1934] A.C. 122.

[4] [1937] A.C. 587; 53 T.L.R. 347; [1937] 1 All E.R. 645.

[5] [1938] A.C. 224; 54 T.L.R. 5; [1937] 4 All E.R. 206.

[6] [1951] A.C. 201; 66 T.L.R. (Pt. 2) 969.

[7] [1952] A.C. 493; [1952] 2 T.L.R. 254.

[8] [1948] V.L.R. 145, 147–148.

[9] (1948) 75 C.L.R. 589.

"difference in value between the Australian pound and the New "Zealand pound . . . the provision is incompatible with the "obligation sounding in Australian pounds." Without wishing to push it too far, that statement is adopted. The great significance of those words is that it was realized that money had to be moved at the time of discharging this obligation. The appellant is entitled to the full clear £N.Z.100 in Melbourne, or to as many Australian pounds in Melbourne as will buy £N.Z.100 clear.

Sir Frank Soskice Q.C. and *E. J. Haughey* (New Zealand) for the respondent. Assuming, as the appellant contends, that the right approach is to look only at the Inscribed Stock Act, 1917, and at the entry in the register in accordance with the Act, it is submitted that, applying the proper canons of construction, the result is that one finds a claim which sounds in Australian pounds, or, in the alternative, if it does not sound in Australian pounds it sounds in New Zealand pounds coupled with a condition that New Zealand pounds are to be repayable in Australian pounds on the basis that one Australian pound is equivalent to one New Zealand pound. The rule on which reliance is placed is best stated in Dicey's Conflict of Laws, 6th ed., p. 734, r. 163: "Where there is a doubt as to the currency in which a debt is "expressed (money of account, money of contract), and especially "where the expression used for the denomination thereof connotes "the currencies of two or more States . . . the money of account "must be ascertained by construing the contract in accordance "with its proper law." And Dicey adds that where English law is the proper law of a contract, the parties are presumed to have intended to measure the obligation in the currency of the country in which the debt is payable. That rule, if it is correctly stated, determines the substance of the obligation. English law is the same for this purpose as New Zealand law, and here New Zealand law is the proper law of the contract. If one finds two people contracting in terms of a currency, using a terminology which describes that currency and some other currency—there being different currencies—then the presumption is that the parties mean the currency of the place of performance of the obligation. That has been established as a presumption which English law would apply going back to the *Case de Mixt Moneys* [10] in 1604. It is a well-recognized presumption which, it is submitted, is applicable in construing the document in the present case. The above-cited rule 163 is new to Dicey's 6th edition. The cases of

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[10] (1604) Davies's Rep. (Ireland) 48.

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Adelaide[11] and *Auckland*[12] were applying the rule in cases in which it was thought that the money of account was identical.

In the document here which sets out the obligation there is only one place of payment, and applying the principle stated in Dicey as a maxim of construction the result is that New Zealand law is the proper law, and unless there are indications to the contrary the result is produced that here Australian currency is designated as the currency of the obligation. In the alternative, as submitted, the obligation is to pay in New Zealand pounds converted into Australian pounds on the basis of one New Zealand pound being equivalent to one Australian pound.

The basic proposition for the appellant—that the result of inscription on the register meant that the obligation sounded in New Zealand pounds—is controverted by a consideration of other New Zealand legislation which, it is submitted, is to be read in conjunction with the Inscribed Stock Act: see the State Advances Act, No. 34 of 1913, the Order in Council (relating to advances to settlers), dated March 23, 1925, and the New Zealand Loans Act, No. 131 of 1908. Section 5 of the last-named Act provides that the Minister may in New Zealand " or elsewhere " by stock, etc., raise sums of money. If he goes abroad and borrows money in Australia by the issue of stock, it was said for the appellant that he could only issue stock if it sounded in New Zealand currency. That is a very doubtful proposition, for various reasons. There is nothing in the Act to prevent the Minister from issuing script sounding in American dollars if he wanted to do so. It is a general power to issue script. This was a developing country, with possibly limited resources, and add to that that at that time it was perhaps only dimly apprehended that there was any difference between New Zealand and Australian currency. Therefore, prima facie, it is not surprising to find in an Act power to authorize a New Zealand Minister to issue script payable and repayable in Australian pounds actually inscribed on the stock. There is no reason why he should not issue stock under the Act of 1917 sounding expressly in Australian pounds.

Bearing those considerations in mind in construing the entry in the stock register for the purpose of resolving an ambiguity, the only possible meaning one can give to the entry is that it sounds either in Australian pounds, or bears the alternative meaning that it constitutes an undertaking of the New Zealand Government to repay one New Zealand pound on the basis of pound for pound Australian and New Zealand. Alternatively,

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[11] [1934] A.C. 122.

[12] [1937] A.C. 587.

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the Act authorizes inscription on the register at any rate of any stock sounding in terms of pounds. It authorizes the inclusion of any pounds which have as multiples of them shillings and pence. That is sufficient for the respondent's purpose and authorizes the issue of stock sounding in Australian pounds.

With regard to sections 25 and 26 of the Loans Act of 1908, which deal with the English register, is one to suppose that section 25 provides for entry in the English register of stock sounding in New Zealand pounds? The contrary is the construction which should be put on that section; it clearly contemplates the entry of stock sounding in non-New Zealand pounds. It is a matter of probability and presumption from which some assistance may be obtained; there is a difficulty, however, in that it is consolidated stock.

Wherever one finds in the document the words that interest is payable or the principal repayable at Melbourne, one should read into it the words which appear on the receipt from the Treasury on the purchase of stock, "At par of exchange." Those words must mean on the basis that one gets one Australian pound for one New Zealand pound. Those words loom very large.

The situation considered in *Bonython's* case[13] was wholly different from that in the present case; in that case, however, the principle that the place of payment in the case of ambiguity is of almost crucial importance is recognized and accepted. [Reference was also made to the International and Comparative Law Quarterly, 1953, vol. 2, p. 303, and to *National Bank of Australasia Ltd.* v. *Scottish Union and National Insurance Co.*[14]] Here the words "payable in Melbourne" are not words of convenience but of substance. It was said in *Bonython's* case[15] that "The Government of a self-governing country, using the "terms appropriate to its own monetary system, must be pre-"sumed to refer to that system whether or not those terms "are apt to refer to another system also. It may be possible "to displace that presumption, but, unless it is displaced, it "prevails." Applying that presumption to section 14 of the Inscribed Stock Act, 1917, can it be said that the registered stock sounds in New Zealand pounds? It is submitted that that is reading too much into the presumption. That is the whole length to which that case goes. The *National Bank of Australasia* case[16] recognizes, it is submitted, that where there is one place of payment the ordinary presumption applies. If there is a latent ambiguity as to the meaning of "payable in Melbourne free of "exchange" the respondent is entitled to look at the surrounding circumstances to resolve it. Neither the *National Bank* case[16] nor *Bonython's* case[17] in any way harm the case put forward by the respondent here.

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[13] [1951] A.C. 201.

[14] (1951) 84 C.L.R. 177, 208.

[15] [1951] A.C. 201, 225.

[16] [1952] A.C. 493.

Cases in this country and abroad before the *Adelaide* case[18] have applied rule 163 in Dicey. As a principle of construction, when a contract or document which provides for payment of money stipulates one place of payment, then in the absence of any indication to the contrary the court will infer that the parties intended the payment to be in the currency of the place of payment as a matter of obligation. [Reference was made to *Case de Mixt Moneys*[19]; *Taylor* v. *Booth*[20]; *Massachusetts Hospital* v. *Provincial Insurance Co.*[21]; *Simms* v. *Cherrenkoff*[22]; *In re Tillam Boehme and Tickle Pty. Ltd.*[23] and *Joffe* v. *African Life Assurance Society Ltd.*,[24] and to Story's Conflict of Laws, 8th ed. (1883), p. 316, para. 272 (a).] The reasoning in *Joffe's* case[24] is adopted; that case is very close in the matter of structure of the obligation to the wording here. [*Bonython's* case in the High Court of Australia[25] was also referred to.]

"At par" means that repayment is to be made in Australian currency on the basis that one Australian pound is equivalent to one New Zealand pound. And "free of exchange" is substantially the same. It means free of deduction because of the fact that there had been a fluctuation of value between the two currencies. Reliance is placed on the composite nature of the phrase "payable in Melbourne free of exchange." "Free of "exchange" should be used in this case in the way it was used in *Thompson* v. *Wylie.*[26] Every single indication in the circumstances of this case from beginning to end points strongly to the view for which the respondent contends.

Haughey following. These propositions recapitulate the gist of the respondent's argument: (1) The basic issue in dispute is what money of account is applicable for the purpose of measuring the obligations assumed by the New Zealand Government under the inscribed stock and debentures. (2) This issue must be resolved by construing the contractual arrangements entered into between the parties as a matter of construction. (3) This question of construction is determinable by the proper law of the contract. (4) It is conceded that the proper law of the contract is New Zealand law. (5) It is also conceded that at all material times New Zealand and Australia have had separate moneys of account. (6) According to the proper law of the contract, i.e., New Zealand municipal law, which, of course, follows English law in this respect, the money of the place of payment and not that of the country of the proper law of the contract is the money of account meant by the parties unless the circumstances indicate a different intention on their part. (7) The terms and history of the contractual arrangements entered into by the parties show quite clearly that the place of payment specified by them was Melbourne, and there are no circumstances which would indicate an intention on their part that the money of account of any other place should be applicable. It is par excellence a case for the application of Dicey's rule 163. (8) In any event, independently and apart from any presumption whatever, the proper inference to be drawn from the contractual arrangements between the parties is that they themselves have expressly stipulated that the obligations of the New Zealand Government in respect of the inscribed stock should be measurable in the money of account of Australia.

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[16] [1952] A.C. 493.
[17] [1951] A.C. 201.
[18] [1934] A.C. 122.
[19] Davies's Rep. 48.
[20] (1824) 1 C. & P. 286.
[21] (1866) 25 U.C.R.(Q.B.) 613.
[22] (1922) 62 D.L.R. 703.
[23] [1932] V.L.R. 146.
[24] [1933] S.A.L.R.(T.P.D.) 189.
[25] (1948) 75 C.L.R. 589, 622.
[26] (1938) 38 N.S.W.S.R. 328.

In effect, this Board is being asked to overrule the *Auckland* case [27] and to dissent from the *Adelaide* case,[28] which has been followed for many years, and those cases, it is submitted, are still quite valid. [Reference was also made to *Alliance Assurance Co. Ltd.* v. *Auckland City Corporation and Auckland Transport Board* [29]; *Goldsbrough Mort & Co. Ltd.* v. *Hall* [30]; *Liebeskind* v. *Mexican Light and Power Co. Ltd.*[31] and *Weiss* v. *State Life Insurance Co.*[32]]

Sir Garfield Barwick Q.C. in reply. There is no ground here for looking at any extrinsic circumstances, for there is no ambiguity. The respondent relied as extrinsic circumstances on (i) Australian investor, and (ii) provision of the money in Australia. But the money was not all provided in Australia. The register is by the statute required to inscribe the whole of the stock and the statutory particulars. It cannot be regarded as merely the registration point for a series of simple loans made by the Minister with individuals under separate contracts. There are in the Inscribed Stock Act inescapable indications that New

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[27] [1937] A.C. 587.

[28] [1934] A.C. 122.

[29] [1936] N.Z.L.R. 413, 457.

[30] [1948] V.L.R. 145, 150.

[31] (1941) 116 Fed.R.(U.S.) 2nd ser. 971.

[32] [1935] S.C.R.(Can.) 461.

Zealand pounds must be the money of obligation. The method of performance—payment in Australian pounds—will not affect the substance of the obligation. The words " free of exchange " are sufficiently ambiguous as to be a very unreliable basis on which to build a view as to the currency of the obligation: *Howard, Houlder & Partners Ltd.* v. *Union Marine Insurance Co.*[33] [*Payne* v. *Deputy Federal Commissioner of Taxation*[34] and *Federal Commissioner of Taxation* v. *Adelaide Electric Supply Co. Ltd.*[35] were also referred to.] The words " free of exchange " have three possible meanings: (i) Free of transmission dues—bank charges; (ii) regardless of difference in exchange values; and (iii) par of exchange. (iii) must apply at the date of payment. The obligation is susceptible of only two constructions: " I " promise to pay £N.Z.100 in Melbourne " or " I promise to pay £A.100 in Melbourne free of exchange." If the substance of the obligation is expressed in Australian pounds, neither (i) nor (ii) would add anything. If the obligation be expressed in New Zealand pounds the only significance is (i)—free of bank charges; between these parties they have their minds centred on banker's charges. Earlier uses of this expression in the correspondence bears this out. Lastly, with regard to Dicey's rule, it is submitted that there is no presumption that the place of payment fixes the money of obligation. Dicey's rule is based on a misconception of the basis of the *Case de Mixt Moneys*.[36]

1956. Feb. 6. The judgment of their Lordships was delivered by LORD REID. This is an appeal from a judgment of the Full Court of the Supreme Court of New Zealand, dated May 31, 1954, in an action brought by the present appellant against the respondent. The question in dispute is the nature and extent of the obligations of the New Zealand Government in respect of five parcels of New Zealand $5\frac{1}{2}$ per cent. inscribed stock and one parcel of bearer debentures, all of which matured on February 1, 1951. Interest was payable on February 1 and August 1 in each year and it is not disputed that interest was duly paid down to and including August 1, 1948. But the appellant alleges that thereafter the New Zealand Government failed to pay to it the whole of the interest due to it, and that on maturity they failed to pay or repay the whole of the principal sum due. It is not disputed that the appellant only accepted under protest the sums paid to it. In this action the appellant sues for the difference between the amounts of interest and principal in fact paid to it and the amounts which it alleges were due to it, and the Supreme Court of New Zealand has adjudged that the appellant do recover nothing against the respondent and do pay to the respondent certain costs.

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[33] (1922) 38 T.L.R. 515; 10 Ll.L. Rep. 627.

[34] [1936] A.C. 497; 52 T.L.R. 627; [1936] 2 All E.R. 793.

[35] (1950) 83 C.L.R. 413.

[36] Davies's Rep. 48.

The register of inscribed stock kept for the New Zealand Government bears with regard to the stock belonging to the appellant the words "Principal and interest payable at "Melbourne free of exchange," and the appellant's certificates of title bear the same words. All the payments made to the appellant in respect of that stock were made at Melbourne in Australian pounds. The appellant contends that the payments ought to have been made in New Zealand pounds. In 1949 and the subsequent years the New Zealand pound was worth more than the Australian pound, and if the appellant's contention is well founded it is entitled to recover the sums sued for in this action. The parties are agreed that the decision of this case ultimately depends on the true construction of the entry in that register, but they are not in agreement as to what facts ought to be taken into consideration in determining this question. As will appear, their Lordships are of opinion that most of the facts the admissibility of which is in dispute would throw no material light on this question and they do not propose to set out more than a summary of these facts. There is before their Lordships an elaborate statement of agreed facts, and there is a full statement of the facts in the leading judgment of Fair J.

The State Advances Act, 1913, as amended, enabled the Minister of Finance, on being authorized by the Governor-General in Council, to raise sums of money on the security of and charged upon the public revenues of New Zealand. The Minister of Finance was duly authorized on March 23, 1925, to raise by way of loan for certain purposes sums amounting to £6,500,000 for the financial year ending March 31, 1926, and he was similarly authorized to raise loans for the same purposes to the extent of the same amount for the next financial year. Pursuant to these authorities the Minister duly borrowed £3,002,500. The statement of agreed facts sets out in paragraph 5 the conditions subject to which this sum was borrowed: it was borrowed in three parts. £1,250,000 was subscribed by English investors and made available at Wellington at par of exchange. There is a London register of inscribed stock, and, in respect of this borrowing, there was issued inscribed stock inscribed on the

London register, and holders of £1,000,000 of this stock were specifically given the option of payment of interest and repayment of principal at London, New York or Wellington, such payment and repayment at New York to be on the basis of 4 dollars 86⅔ cents to the United Kingdom pound. The remaining £250,000 and the interest thereon were respectively payable in London only.

The sums with which this case is concerned were part of £1,644,500 subscribed by Australian investors and made available at Wellington at par of exchange. The inscribed stock issued in respect of this borrowing was inscribed in the New Zealand register, and the principal and interest moneys were respectively repayable and payable in some cases at Melbourne and in others at Sydney (as arranged at the time of issue) free of exchange. There was no option to change the place of repayment or payment of interest. There was also a sum of £108,000 subscribed by Australian investors in respect of which bearer debentures were issued which provided for payment at Melbourne with no option to transfer the place of payment.

In September, 1925, there were negotiations between the Secretary to the Treasury and a firm of stockbrokers with a view to obtaining loans: no prospectus was issued, but after some correspondence the appellant through the stockbrokers applied for £72,500 New Zealand 5½ per cent. inscribed stock and £72,500 was received from the appellant by the Bank of New Zealand at Melbourne for the credit of the Public Account and was by direction of the Treasury remitted to that bank at Wellington. The stockbrokers were paid 10s. per cent. by the New Zealand Government, and out of that commission they paid the cost of the exchange so that the full sum of £72,500 was provided for the New Zealand Government at Wellington.

The appellant later applied and paid for further large amounts of inscribed stock, the last application being in August, 1926. It was agreed that on these later occasions the procedure was similar and it is unnecessary to narrate the steps taken on each of these occasions. In due course the appellant received certificates of title. In some cases the appellant had sold part of the stock before receiving the certificates and, in respect of the first transaction, it received after a considerable time a certificate which stated that the appellant "is the registered holder of sixty-one "thousand five hundred pounds 5½ per cent. New Zealand "inscribed stock maturing February 1, 1951, which amount has "been duly inscribed in the books of the Treasury under the "name and address mentioned above. This certificate is con-"clusive evidence of the ownership of the stock to which it "relates and is proof that no stock certificate is outstanding in "respect of that stock." The certificate bore on its face the words "Principal and interest payable at Melbourne free of "exchange."

Section 2 of the New Zealand Inscribed Stock Act, 1917, defines inscribed stock as "the claim which any person has "against the Public Revenues by virtue of an entry made "pursuant to this Act on the register of inscribed stock under "the name of such person," and it is therefore essential to see how the entries with regard to the appellant were made. The heading is

"State Advances Act, 1913 (Advances to Settlors Branch)

"Maturing February 1, 1951. Interest at 5½% payable 1st "February 1st August

"Principal and interest payable at Melbourne free of "exchange

"Warrant to go to General Manager

"The National Mutual Life Association of Australasia Ltd., "395, Collins Street, Melbourne, Victoria."

Then there follows a tabular statement. On the right side of the page is the first entry "Oct. 15. 1925 51/2 By cash "72,500." Below that are other entries showing further sums paid. On the left of the page are numerous entries for 1927 and 1930 showing various amounts of stock sold by the appellant against the words "To Transfer." And in the middle of the page there is a column which apparently shows the amount of stock owned by the appellant after each operation. The first figure in this column is 72,500, and below that is a series of figures which increase to 402,500 by reason of the payments made for stock taken up by the appellant in 1926 and then diminish by reason of the appellant's various sales of stock. The last figure in this column is 117,500, and against it is the entry "Feb. 1. 1951 To Redemption DE 327 117500."

The statement of agreed facts states with regard to the matter which has given rise to this litigation:

"38. On or about August 20, 1948, the official exchange rates "of the Dominion of New Zealand and of the Commonwealth "of Australia diverged and thereafter at all material times "subject to banking fluctuations £125 Australian currency was "the equivalent of £100 New Zealand currency.

"39. Thereafter the New Zealand Government through its "agents continued to pay the interest due on February 1, 1949, "and all subsequent payments of interest accruing in respect of "all the said parcels of inscribed stock and of the said bearer "debentures in Melbourne at the rate of 5½ per cent. per annum "on the nominal or face value thereof on the basis that the "measure of its obligation thereunder was in Australian currency "or money of account.

"40. The New Zealand Government through its agents "tendered and paid in Melbourne on February 1, 1951, in repayment of the principal moneys due in respect of all the said "parcels of inscribed stock and of the said bearer debentures at "the nominal or face value thereof measured in Australian "currency or money of account, namely, the sum of £526,500 "in Australian currency or money of account."

The statement of agreed facts then narrated that the appellant accepted all payments after August 20, 1948, "with a full "reservation of its claim that the indebtedness of the New "Zealand Government could only be discharged by payment of "the nominal or face value of the several obligations in New "Zealand currency or its equivalent in Australian currency in "Melbourne at the current rate of exchange applicable as at the "date of each payment."

The question for decision in this case is difficult, but it is narrow in scope. It is admitted that at all revelant times the monetary systems of New Zealand and Australia were different and that even while they were of the same value the New Zealand pound and the Australian pound were different units. It is further admitted that the proper law of the contracts is the law of New Zealand and that to succeed the respondent must show that the obligations of the New Zealand Government construed by that law were obligations to pay Australian pounds.

Their Lordships must first notice arguments by the appellant which, if correct, would lead to the conclusion that it was ultra vires of the New Zealand Government to enter into an obligation to pay interest on New Zealand inscribed stock or to repay the principal of such stock in anything but New Zealand money. It was of course not maintained that it would be ultra vires to undertake to pay, out of New Zealand, in the currency of the place of payment an amount equivalent at the time of payment to a sum in New Zealand pounds, but it was argued that by the law of New Zealand the measure of every obligation in respect of inscribed stock must be New Zealand pounds. This argument was based on the relevant New Zealand statutes: it was said that the Governor-General in Council can only authorize borrowing under the State Advances Act, 1913, in New Zealand pounds, and that if the Minister of Finance should undertake an obligation in some other money of obligation or money of account it could not be determined whether such borrowing was within the amount authorized by the Governor-General in Council; if the New Zealand currency should depreciate such an obligation might well require for repayment of the loan the raising from the public revenues of a larger sum than that authorized to be borrowed.

There is reference in the judgments of the Supreme Court to difficulties which might arise if obligations were undertaken to repay loans in foreign currency, but the question whether an obligation to pay foreign currency would be ultra vires was not clearly raised or dealt with and it is not raised in the appellant's Reasons in this appeal. Reference has already been made to paragraph 5 of the statement of agreed facts, which states that certain subscribers were specifically given the option of payment in New York on the basis of $4.86\frac{2}{3}$ to the United Kingdom pound, and it is difficult to see how the giving of that option could be intra vires if this argument is well founded. It is true that the rights of those subscribers are not affected by this case, but the submission of this statement and the absence of any suggestion of ultra vires emphasize the fact that this point has never been properly raised. It is a matter on which it would be of the utmost importance to have the views of the judges of the Supreme Court and, in view of the far-reaching consequences which a decision of this question might have, their Lordships are not prepared to deal with this new argument in this appeal.

But the appellant is entitled to argue, and does argue, that there is a strong presumption that a Government will not undertake an obligation to repay money borrowed on the security of its revenues except on the basis that the sum to be repaid is to be measured by its own currency. In *Bonython* v. *Commonwealth of Australia*[1] it was said: "The Government of a self-"governing country, using the terms appropriate to its own "monetary system, must be presumed to refer to that system "whether or not those terms were apt to refer to another system "also. It may be possible to displace that presumption, but, "unless it is displaced, it prevails." In their Lordships' judgment the question for decision in the present case is the true construction of the obligation undertaken by the New Zealand Government taking that presumption into account.

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[1] [1951] A.C. 201, 202; 66 T.L.R. (Pt. 2) 969.

The obligation of the Government of New Zealand is contained in the entry in their register of inscribed stock which has already been set out. There is no material difference between it and the terms of the appellant's applications for stock and the terms of the certificates of title issued to the appellant, so it is unnecessary to consider what the position would be if there were any material differences between these documents. Arguments were submitted that in construing the entry in the register other matters should be taken into account, such as the facts that the lender resided in Australia and that the money lent came from Australia, but their Lordships do not find it necessary to consider whether as a matter of law any such extrinsic circumstances can be considered, because they do not find in the agreed facts anything which could materially affect the construction of the obligation. It is necessary to determine what was the substance of the obligation—whether it was an obligation to pay the face value of the stock in Australian pounds or an obligation to pay the face value in New Zealand pounds or their equivalent at the date of payment. If it is not sufficiently plain from the terms of the entry in the register that the obligation was an obligation to pay the face value of the stock in Australian pounds then in their Lordships' judgment any inference which could be drawn from the agreed facts would be quite insufficient to overcome the presumption which has to be overcome if the respondent is to succeed. And if the terms of the obligation are sufficiently plain to overcome the presumption then extrinsic evidence is unnecessary. Their Lordships would, however, draw attention to the fact that this stock was transferable and that the stock issued to the appellant was only a part of the £1,644,500 issued to Australian investors subject to the condition that principal and interest should be payable in Australia free of exchange. If extrinsic evidence were admitted to control the meaning of this condition the result might be that, by reason of different circumstances attending investment by different investors, this condition would have one meaning as regards stock issued to one investor and a different meaning as regards stock issued to another investor. So a transferee might have different rights if he brought apparently identical stock from different holders. That would be a strong argument against the admissibility of evidence of the circumstances in which the stock was issued to a particular stockholder.

The arguments for the appellant were based to a large extent on their Lordships' decision in *Bonython* v. *Commonwealth of Australia*,[2] so it is necessary to examine that case. The holders of inscribed stock of the Commonwealth had an option to be paid the principal sums due on January 1, 1945, in Brisbane, Sydney, Melbourne or London, and a stockholder exercising his option to be paid in London claimed to be paid the face value of his stock in British currency. His claim failed, and he was held only entitled to receive in British currency the equivalent of the face value of the stock in Australian currency. The Commonwealth stock had replaced debentures issued by the Queensland Government and it was admitted that it was necessary to determine the rights of the old debenture holders. In their Lordships' judgment it was said[3]: "Necessarily the question is a somewhat "artificial one; for it is safe to assume that a divergence in the "value of the Queensland pound and the English pound was in "the contemplation of nobody. But this at least seems clear, "that, if no such divergence was thought of, it cannot have been "intended that a debenture-holder should obtain a different "measure of value, or the Queensland Government be placed "under a different liability, according to the place of payment; "in other words, it is clear that the same substantial obligation "was imposed on the Queensland Government whatever the "place chosen for payment, the choice being given to the "debenture-holder purely as a matter of convenience."

That reason does not apply to the present case where there is no option as to the place of payment, but their Lordships did deal with cases where there was no such option. In dealing with *Adelaide Electric Supply Co. Ltd.* v. *Prudential Assurance Co. Ltd.*,[4] after criticism of some of the reasoning in the House of Lords, it was said[5]: "But the decision itself can be fairly "rested on the fact that under the altered articles of the "Adelaide company payment of dividends on its stock was to be "made in Australia only. It was therefore easy to conclude that "on the true construction of the contract the place of performance determined the substance of the obligation, i.e., the "currency by which the obligation was to be measured. . . . "In the present case it is clear that, if it had been provided that "payment would be made in London only, that would have been

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[2] [1951] A.C. 201.
[3] Ibid. 219.
[4] [1934] A.C. 122; 50 T.L.R. 147.
[5] [1951] A.C. 201, 220–221.

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"an important factor in determining the substance of the obligation, though other features, not present in the *Adelaide* case,[6] could not be ignored."

Their Lordships accept this as recognizing that, if there is only one place of payment, that is an important but not a decisive factor in determining whether the currency of the Government which issued the stock or the currency of the place of payment is the measure of the obligation. Nor is the measure of the obligation conclusively determined by finding what is the proper law of the contract. It is possible for parties contracting under the law of New Zealand to make the Australian pound the measure of the obligation.

Their Lordships must also examine *National Bank of Australasia Ltd.* v. *Scottish Union and National Insurance Co. Ltd.*,[7] although that case is not so directly in point. There were registers of the bank's stock in Australia and in London and a stockholder could at any time have his stock transferred from one register to the other, and it was held that the measure of the obligation was not the currency of the place where the stock happened to be registered and where therefore payment had to be made, but was the currency of Australia in all cases. Their Lordships quoted with approval from the judgment of Dixon J. (as he then was) in the High Court of Australia[8]: "great care must be exercised in using the place of payment as a consideration supporting an inference that the substance of the obligation is to be measured in the money of the same place." That is undoubtedly true, and particularly where there are alternative places of payment.

It was argued for the respondent that the mere fact that the only place of payment is in Australia is sufficient to overcome any inference arising from the fact that the borrower is the Government of another country. That is a question which their Lordships do not find it necessary to decide in this case because the condition attaching to this stock is not merely that payments shall be made at Melbourne: it is "principal and interest payable at Melbourne free of exchange." It is therefore necessary to find what are the possible meanings of this condition. No doubt the New Zealand Government might happen always to have sufficient funds available in Melbourne, but it was at least reasonable to suppose that that Government would or might have to send funds to Melbourne to effect payment there.

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[6] [1934] A.C. 122.

[7] [1952] A.C. 493; [1952] 2 T.L.R. 254.

[8] [1952] A.C. 511.

The appellant argued first that the obligation was to hand over New Zealand pounds to the stockholder in Melbourne either in the form of New Zealand legal tender or in the form of a cheque or draft on the Government's bank in New Zealand expressed in New Zealand pounds. But that can hardly be reconciled with "free of exchange," because the first thing the recipient in Melbourne would have to do would be to exchange the notes or cheque for Australian currency, and nothing in the nature of exchange would have been done by the Government: it would simply have posted or otherwise sent to its agent in Melbourne or to the stockholder direct the necessary notes or cheque. Their Lordships therefore reject this argument.

Then the appellant argued that the substance of the obligation was to pay New Zealand pounds, that this condition related only to the mode of performance and that it meant that there should be paid in Melbourne such a sum in Australian currency as was at the time of payment of the same value as the New Zealand pounds comprised in the obligation. Free of exchange, on this view, would mean only that any banker's charges were to be borne by the government.

The third meaning is that for which the respondent contends: that the obligation was to pay in Australian pounds the face value of the interest or stock and that "free of exchange" was inserted to show that no question of exchange was to be brought into the matter. The New Zealand Government was not to be entitled to say that the transmission of funds to Melbourne had cost it a certain sum, or that its currency had depreciated and that by reason of exchange it could not pay in Australian pounds the face value of its obligation.

Their Lordships must choose between the latter two interpretations of this condition. There is no evidence that "free of "exchange" had any technical meaning in 1925, nor is there any evidence as to how exchange was operated then or is operated now. There is only the agreed fact, already quoted, that in 1948 the official exchange rates diverged and thereafter, subject to banking fluctuations, £125 Australian currency has been the equivalent of £100 New Zealand currency.

There is before their Lordships a document which shows that in exchange for an interest warrant for £100 in New Zealand currency there would have been paid in Australian currency by a bank in Melbourne in 1926 £99 12s. 6d., in 1929 £99 15s. 0d., in 1934 £100 10s. 0d. and in 1938 £100 5s. 0d. These appear to be dates at which the two pounds were equivalent in value and the reasons for these differences are not explained, but it would seem that at a time when the pounds were of equal value a customer presenting to a bank in Melbourne a sum in New Zealand currency or a draft on New Zealand did not simply get that sum less a charge for the bank's services, but that there had to be taken into account an element of exchange between the two currencies and that the rate of exchange might vary from time to time. And even if this is not a correct interpretation of the facts set out in this document, their Lordships are of opinion that it must be assumed that it was known in 1925 that there could be a rate of exchange other than at par between the two currencies of New Zealand and Australia, even at a time when the two currencies were equivalent in value. Their Lordships have already stated that in their judgment all payments which had to be made in Melbourne must be made in Australian currency; and in their judgment the stipulation that the payments were to be made there "free of exchange" must have meant from the beginning that the rate of exchange between the two currencies at the time when any payment became due was to be disregarded in determining the amount of Australian currency payable. So a stockholder owning say £1,000 of the 5½ per cent. inscribed stock to which this stipulation applied was entitled to be paid in Melbourne as interest in 1926 and each subsequent year £55 in Australian currency, because that is the necessary result if the rate of exchange had to be disregarded.

During the period when the two currencies remained equivalent in value the rate of exchange could not depart far from parity, and the effect of the stipulation that payments must be made free of exchange must have been small. But the meaning of the stipulation could not change when the values of the currencies diverged, and it applied to repayment of principal as well as to payment of interest. Their Lordships must therefore hold that the obligation of the New Zealand Government is to repay in Melbourne in Australian currency a number of pounds equal to the face value of the stock.

It was argued that "free of exchange" is an appropriate expression if the stockholder is being protected against some deduction but is not an appropriate expression to deprive him of an advantage—in the present case the advantage of getting more than the face value of his security by reason of the exchange rate between Australia and New Zealand. But in their Lordships' view "free of" can well mean "independent of." It may be that the primary purpose of this condition was to protect Australian stockholders in the event of the New Zealand pound being worth less in Australia than the Australian pound, but the condition cannot be interpreted so as to be in favour of Australian stockholders in that event and also to be in their favour when the New Zealand pound is worth more than the Australian pound. If they were entitled to be paid in Australian pounds in the one event they could not be entitled to be paid in the equivalent of New Zealand pounds in the other event. In their Lordships' judgment they were entitled in either event to be paid the face value of the obligation in Australian pounds.

Their Lordships must also deal with the view expressed by Gresson J.[9] "The phrase 'free of exchange' negatives the "adoption of Australian currency as the money of account for "if the debt was a stated number of Australian pounds there "could be no question of exchange. . . . If Australian currency "was to be the money of account as well as the money of "payment, no exchange operation could arise." Their Lordships recognize that there is force in this argument, but are of opinion that the purpose and meaning of the phrase is that no exchange operation is to be performed in determining the number of pounds to be paid and that any payment must be in Australian pounds. Without the words "free of exchange" it might have been said that an exchange operation was necessary if the New Zealand Government was to pay in Australian pounds, but these words indicate that, if the New Zealand Government have to perform an exchange operation in order to make payment at Melbourne, that operation shall not be taken into account in determining the amount of Australian currency which has to be paid.

For the reasons given their Lordships will humbly advise Her Majesty that this appeal should be dismissed. The appellant must pay the costs of the appeal.

Solicitors: *Markby, Stewart & Wadesons; Mackrell, Maton & Co.*

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[9] [1954] N.Z.L.R. 754, 798.

FLORENCE EMMA WARD AND OTHERS . . APPELLANTS; J. C.*
AND 1956
COMMISSIONER OF INLAND REVENUE . RESPONDENT. *Feb. 14.*

ON APPEAL FROM THE COURT OF APPEAL OF NEW ZEALAND.

New Zealand—Revenue—Estate duty—Transfer of real property—In consideration of annuity for life—"Disposition of property"—"Accompanied by . . . a contract for . . . benefit to the deceased"—Property liable to duty on death—Death Duties Act, No. 21 *of* 1921 (*New Zealand*), *s.* 5 (1) (*j*) (*ii*).
Revenue—Estate duty.

By section 5 of the Death Duties Act, 1921, of New Zealand: "(1) In computing . . . the final balance of the estate of a deceased "person his estate shall be deemed to include . . . (*j*) Any "property comprised in any settlement, trust, or other disposition "of property made by the deceased . . . and situated in New "Zealand at the death of the deceased,— . . . (ii) Which is "accompanied by . . . a contract for any benefit to the deceased "for the term of his life . . ."

The deceased was the owner of real property in New Zealand which, in 1932, he had transferred to his sons for full consideration in the form of annuities payable to himself and his wife for life. On the death of the deceased in 1949 the Commissioner of Inland Revenue, relying on section 5 (1) (*j*) of the Death Duties Act, included in the deceased's estate for the purposes of estate duty the value at the date of the death of the real property the subject of the transfer:—

Held, that the transfer exactly answered the description of a "disposition of property . . . which is accompanied by . . . a "contract for any benefit to the deceased for the term of his life," and that consequently the property comprised therein came within section 5 (1) (*j*) (ii) of the Act of 1921. The words "disposition "of property" in their ordinary meaning were wide enough to include this transfer. Any transfer of property which possessed the characteristics described in sub-paragraphs (i), (ii) and (iii) of paragraph (*j*) was a disposition to which that paragraph applied. Further, there was no reason for implying in section 5 (1) (*j*) an exception in the case of a purchase for full consideration in money or money's worth.

Observations of Lord Loreburn L.C. in *Lethbridge* v. *Attorney-General* [1907] A.C. 19; 23 T.L.R. 123 explained.

Commissioner of Stamp Duties v. *Russell* [1948] N.Z.L.R. 520 and *Craven* v. *Commissioner of Stamp Duties* [1948] N.Z.L.R. 550 considered.

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* *Present*: VISCOUNT KILMUIR L.C., LORD OAKSEY, LORD MORTON OF HENRYTON, LORD RADCLIFFE, LORD COHEN.

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Judgment of the Court of Appeal of New Zealand [1955] N.Z.L.R. 361 affirmed.

Appeal (No. 18 of 1955) from a judgment of the Court of Appeal of New Zealand (October 29, 1954) which reversed a judgment of the Supreme Court of New Zealand (September 7, 1953) in favour of the present appellants on an appeal brought by them by way of a case stated by the respondent under section 62 of the Death Duties Act, 1921, of New Zealand.

The appellants were the administrators of the estate of Charles Cameron Ward, of New Plymouth, New Zealand, who died on April 18, 1949, and probate of whose will was granted to them on June 9, 1949.

The following facts and statutory provisions are taken from the judgment of the Judicial Committee: The property which was the subject of this appeal was situate in Devon Street, New Plymouth, New Zealand. Prior to June 15, 1932, Charles Cameron Ward was the owner and registered proprietor of the Devon Street property, subject to two mortgages for an aggregate sum of £5,000 and to a lease thereof to C. C. Ward Ltd. for a term of 10 years from February 17, 1930, at a rental of £600 a year. On June 15, 1932, Mr. Ward transferred the Devon Street property (subject to the mortgages and the lease) to his four sons as tenants in common in equal shares. [In paragraph 6 of the case stated it was said that the transfer was executed "in "consideration of the said sons executing a memorandum of mort-"gage securing to the deceased an annuity for the remainder of "his life of the sum of £650 payable by weekly instalments of "£12 10s. 0d. and further securing after the death of the deceased "a weekly payment of £6 as therein provided to the said Selina "Ward, during the remainder of her life so long as she should "remain unmarried."] Charles Cameron Ward died on April 18, 1949, and the respondent, in computing the final balance of his estate, included a sum of £17,265 representing the value of the Devon Street property on the death of the deceased (£22,265) less the aggregate amount of the said two mortgages. In so acting, the respondent relied upon the terms of sub-paragraph (*j*) of section 5 (1) of the Death Duties Act, 1921. The appellants contended that that sub-paragraph had no application to the present case. There was no dispute as to facts or figures, and the question for decision turned entirely upon the construction of the relevant statutory provisions.

Section 2 of the Act of 1921 contained a number of definitions introduced by the words "In this Act, unless a contrary "intention appears."

Section 3 imposed estate duty in the following terms: "In "the case of every person who dies after the commencement of "this Act, whether in New Zealand or elsewhere, and wherever "the deceased was domiciled, there shall be payable to the "Crown on the final balance of the estate of the deceased, as "determined in accordance with this Act, a duty (hereinafter "called estate duty) at the rate and in accordance with the provisions prescribed by this Act."

Section 5 was the vital section: "5.—(1) In computing for "the purposes of this Act the final balance of the estate of a "deceased person his estate shall be deemed to include and "consist of the following classes of property. . . . (*g*) Any "annuity or other interest purchased or provided by the "deceased, whether before or after the commencement of this "Act, either by himself alone or in concert or by arrangement "with any other person, to the extent of the beneficial interest "accruing or arising by survivorship or otherwise on the death "of the deceased, if that annuity or other interest is property "situated in New Zealand at the death of the deceased: . . . "(*j*) Any property comprised in any settlement, trust, or other "disposition of property made by the deceased, whether before "or after the commencement of this Act, and situated in New "Zealand at the death of the deceased,—(i) By which an interest "in that property, or in the proceeds of the sale thereof, is "reserved either expressly or by implication to the deceased for "his life or for the life of any other person, or for any period "determined by reference to the death of the deceased or of "any other person; or (ii) Which is accompanied by the reservation or assurance of, or a contract for, any benefit to the "deceased for the term of his life or of the life of any other "person, or for any period determined by reference to the death "of the deceased or of any other person; or (iii) By which the "deceased has reserved to himself the right, by the exercise of "any power, to restore to himself or to reclaim that property "or the proceeds of the sale thereof."

Section 39 began: "In this Act the term 'disposition of "'property' means (*a*) Any conveyance, transfer, assignment, "settlement, delivery, payment, or other alienation of property, "whether at law or in equity."

The question formulated in the case stated was "whether "the respondent in computing the final balance of the dutiable "estate of the deceased is entitled pursuant to section 5 (1) (*j*) "of the said Act to include the said sum of £17,265."

In the Supreme Court of New Zealand, Gresson J. held that the respondent was not entitled to include that sum. On appeal his decision was reversed by the Court of Appeal (Hutchison and McGregor JJ., Barrowclough C.J. dissenting).

1956. Jan. 17, 18, 19. *Roy Borneman Q.C.* and *Robin McEwen* for the appellants. Some 17 years before he died the deceased transferred or sold his Devon Street property to his sons for full consideration, which took the form of annuities payable to himself and his wife for life. It was a commercial transaction and certainly such a transaction as would have been made between strangers. It was real property, and it passed completely from the deceased on the transfer; he had no interest left in it at any time. The Crown, however, claimed estate duty on the value of the property at the date of death. There is no dispute about the figures. The value of the property at the time of the transfer in 1932 was £11,195; it was subject to mortgages totalling £5,000, and was therefore then worth £6,195 in the open market. It was transferred in consideration of annuities to the deceased and his wife the value of which was £7,247 at that time. The value of the property at the date of the death in 1949 was £22,265, and that figure less the £5,000 mortgage, namely, £17,265, is the sum on which the Revenue claimed duty.

The Crown's argument in this case must, it is submitted, go so far as to say that if the deceased had sold or transferred this property to an insurance company the money would still have been caught; and further than that, if the deceased had paid £6,195 cash to an insurance company for these annuities, still, on the Crown's argument, that would have been dutiable.

A claim of this nature could not, of course, arise in the United Kingdom. The issue here is whether in the terms of the New Zealand statute the words are strong enough to enable the Crown to charge duty on this £17,265. *Lethbridge* v. *Attorney-General* [1]—a decision on section 2 (1) (*d*) of the English Finance Act of 1894, which corresponds with section 5 (1) (*g*) of the New Zealand Act—supports the view that a transaction made for full consideration does not fall within section 5 (1) (*j*). Lord Loreburn L.C. said in that case [2]: "The general purpose of this subsection is to

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[1] [1907] A.C. 19.

[2] Ibid. 23.

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"prevent a man escaping estate duty by subtracting from his "means, during life, money or money's worth, which, when he "dies, are to reappear in the form of a beneficial interest accruing "or arising on his death. Now it is not subtracting from his "means if the deceased has received a full equivalent in return "for whatever he has laid out." In *Riddiford* v. *Commissioner of Stamps*[3] there was not an arm's length transaction—a commercial transaction; it was in the nature of a settlement. *Lethbridge's* case[4] was followed in *Commissioner of Stamp Duties* v. *Russell*[5] and *Craven* v. *Commissioner of Stamp Duties.*[6]

The main submissions are: (1) The property which is sought to be charged was not "comprised in any settlement, trust or "other disposition of property." If that is right, it is an end of the case. This is not a case where "other disposition of "property" should be interpreted upon the application of the terms of section 39 simpliciter; that phrase must be construed as ejusdem generis with the preceding words "settlement" and "trust," or at the very least the words in this context take their colour from each other. So construed, the words do not include the transfer in question. The definition in section 39 is not to be imported into section 5 (1) (*j*). Section 39 and the definition of "disposition of property" does not fit naturally in the separate paragraphs of (*j*), and it would not be right to import it lock, stock and barrel into (*j*). The question must be, what is the meaning of that phrase in this particular section of the Act? *Strathern* v. *Padden*[7] deals with the application of a definition section. It is too late when one gets to sub-paragraphs (i), (ii) and (iii) and their particular words to colour the word "disposition"; it has already taken its colour from its exclusive type of association with "settlement" and "trust." There are four characteristics of this particular transaction: (1) There is no element of bounty. (2) The consideration was commercially adequate. (3) There was no benefit to the disponor and no intention to benefit. (4) The transaction does not have the quality or characteristics of a settlement in which there is a modification or restriction of the power of disposition. In his judgment in the Court of Appeal in the present case McGregor J. said: "I accept the principle that "a transaction or instrument whereby full rights of immediate "alienation of the legal title are conferred on the transferee "cannot be a settlement. . . . I take the view that the property

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[3] (1913) 32 N.Z.L.R. 929, 958.
[4] [1907] A.C. 19.
[5] [1948] N.Z.L.R. 520.
[6] [1948] N.Z.L.R. 550.
[7] 1926 S.C.(J.) 9.

"was not settled and the instruments whereby the transaction "was effected do not amount to a settlement within the meaning "of the section." And in *Buzza* v. *Comptroller of Stamps* (*Victoria*)[8] it was said that "a transfer of property which immediately gives a full right of disposition of the whole interest in "the property cannot be described as a settlement." On this first submission, therefore, in all the circumstances of this case, where there was a transaction substantially of sale for full value, it cannot be said that it was a settlement. It was a contract, of course, but not every contract is a settlement.

If the first submission is wrong, then (2) in any event, on the facts of this case neither sub-paragraph (i), (ii) nor (iii) of section 5 (1) (*j*) is satisfied. If that is so, that is an end of the Crown's case. This is not a (*j*) (i) case at all—there was not here an interest reserved out of the property itself when it has been sold and nothing has been kept back. There is one authority on the word "reserved," *Commissioner of Stamps* v. *Finch*,[9] in which it was said that there could be no reservation unless it issued out of the thing granted. On a fair construction of the facts in this case the disponor did not reserve to himself at that or any time an interest in or out of the property.

Sub-paragraph (ii) sets out a completely different test, and on this it is submitted (a) that there is no relevant accompanied reservation, and (b) there is no benefit. As to (a), there is nothing to accompany a settlement, trust or disposition; it has all been used up. A settlement is something different from that by which it is accompanied: *Russell's* case.[10] If one has exhausted all one's material in arriving at a settlement it cannot be said that there is anything accompanying it. In the present case there is not a settlement until the security has been brought in. In *Craven's* case[11] the transfer and settlement were two different things. In order that (*j*) (ii) may come into operation there must be found a reservation or assurance which is separate and distinct from the settlement, and if all the material has already been used up in arriving at the settlement it cannot be said that there is anything left to accompany it. In so far as the ratio decidendi of *Craven's* case[11] and *Russell's* case[12] do not support this view it is submitted that they are wrong. With regard to (b) (supra)—that there was no benefit—the settlement does not reserve a benefit if there is a sale and the full price is paid for the consideration. In *Inland Revenue Commissioners* v. *Lactagol Ltd.*[13] Harman J. said that a sum paid to a director was not a benefit because it was a fair commercial price. There is not a benefit if there is a contract at arm's length.

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[8] (1951) 83 C.L.R. 286, 295.

[9] (1912) 32 N.Z.L.R. 514, 517.

[10] [1948] N.Z.L.R. 520, 543.

[11] [1948] N.Z.L.R. 550, 564.

[12] [1948] N.Z.L.R. 520.

If either or both of the above two main submissions is unacceptable, then (3) the Board should not construe the words used in section 5 (1) (*j*) in their context so as to catch a transaction which is made for full value on such terms as would be made between strangers—for full consideration at arm's length and on terms that would be made in ordinary commercial transactions. [*Grey* v. *Pearson*[14] was also referred to.]

Geoffrey Cross Q.C. and *J. Byrne* (New Zealand) for the respondent. With regard to the appellants' first point, it is submitted that the transaction here in question was a settlement within the meaning of section 5 (1) (*j*), or, if that is wrong, was an " other disposition of property " within (*j*). On the appellants' second point, it is submitted that the transaction comes within section 5 (1) (*j*) (i); if that is right, it is sufficient. It is also contended that it comes within (*j*) (ii), and, although the point was never taken below and never argued, it is also submitted that it is fairly within (*j*) (iii). As to the appellants' third point, it is submitted that there is no room here to imply any exclusion of transactions for full consideration, either on the basis of anything to be deduced from *Lethbridge's* case[15] or on any other ground.

A consideration of the legislative genesis of section 5 in the English Acts shows that there was nothing corresponding to " other disposition of property " in the English legislation; and there is nothing in the New Zealand legislation corresponding either to the general exemption of transactions for full consideration in section 3 of the Finance Act, 1894. It may be that the New Zealand legislature thought it wise to omit an exemption which the English legislature has subsequently whittled away. The Board is entitled to consider English Acts from which the New Zealand Acts descended. [Reference was made to *Commissioner of Stamp Duties (N.S.W.)* v. *Perpetual Trustee Co.*[16] and to Green's Death Duties, 3rd ed., p. 91.]

With regard to the words " settlement, trust or other dis- " position," Hutchison J. in his judgment in the present case put the matter in the right way when he said that he thought that the view taken by the judge in the court below " is subject to the

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[13] (1954) 35 T.C. 230, 237–238.

[14] (1857) 6 H.L.C. 61, 99, 106.

[15] [1907] A.C. 19.

[16] [1943] A.C. 425.

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" criticism that he interpreted the words 'settlement, trust or " 'other disposition' in the early part of paragraph (j) as if that " expression stood alone. . . . I think that the relevant context " is to be found in the whole of the paragraph, an important part " of which is contained in the sub-paragraphs (i), (ii) and (iii)." If he is right in saying that the genus is to be found in (i), (ii) and (iii), the question whether this strictly speaking is a settlement or whether the definition section applies to dispositions of property would not really arise.

The critical quality of a settlement would be that the disposition creates some limited interest in the property for a period, normally the period of a life or lives. If that is true, there is a settlement here. Even if " other disposition " is read as ejusdem generis with " settlement " or " trust," then it is analogous to a settlement because it has this feature of creating limited interests in the property. If it is not strictly a settlement it is analogous to one. There is nothing in the nature of a settlement or trust which connotes necessarily any bounty: *Buzza* v. *Comptroller of Stamps* (*Victoria*)[17]; so it is not a good point to say that there must be found an element of bounty. There is nothing in the nature of a settlement or trust which in itself imports absence of consideration.

When there is a transaction with an insurance company cash is paid; it would be at arm's length and a proper actuarial value would be given, and it would be quite impossible for the Revenue to say on the death of the deceased that the cash or anything representing the cash was situated in New Zealand.

The decision in *Lethbridge* v. *Attorney-General*[18] does not govern and has no bearing on the construction of section 5 (1) (j) of the Act.

Byrne, following, referred, on the application of the definition section 39, to *Public Trustee* v. *Commissioner of Stamps*.[19] If it had been intended to limit the definition, nothing would have been easier than to say so. The natural inference is that the legislature intended this definition to apply regardless of whether there was anything in the context to suggest a contrary intention. There appears to be no case where a family transaction of this nature has not been regarded as subject to section 5 (1) (j).

Borneman Q.C. in reply. This is a case where there was a commercial price paid; it is not a family arrangement in the sense in which that phrase is used in *Riddiford's* case,[20] *Russell's* case [21] and *Craven's* case.[22] In the end the Board is left unassisted by authority to construe this section. With regard to the insurance point, Gresson J. in his judgment in the Supreme Court put a very pertinent illustration and as good a one as can be found; he was absolutely right when he said: "If the unrestricted interpretation of the subsection contended for by the respondent were "correct it would produce results which one hesitates to believe "the legislature could have intended. Upon the basis of such "a wide interpretation if a man should expend his capital of say "£5,000 in payment to an insurance company in the purchase "of an annuity that sum would fall to be included as dutiable "estate when he died. He might in fact have consumed the "whole of his capital in this way yet at his death be assessed "as having a notional capital although in fact it had ceased to "exist in any traceable form."

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[17] 83 C.L.R. 286, 297.

[18] [1907] A.C. 19.

[19] (1912) 31 N.Z.L.R. 1116, 1119.

Feb. 14. The judgment of their Lordships was delivered by LORD MORTON OF HENRYTON, who stated the facts and the relevant sections of the Act as set out above, saying that their Lordships had carefully considered section 5, the vital section, as a whole, and continued: Having set out these statutory provisions their Lordships are now able to state in precise terms the question which has to be decided. The Devon Street property was clearly "comprised" in the transfer of June 15, 1932, and the question is whether, on the true construction of section 5 (1) (*j*) of the Act, that transfer was either: (*a*) a "settlement" coming within sub-paragraph (i) or sub-paragraph (ii) or sub-paragraph (iii) of paragraph (*j*); or (*b*) a "trust" coming within any one or more of these sub-paragraphs; or (*c*) a "disposition of property" coming within any one or more of these sub-paragraphs.

It has not been suggested that the transfer was a "trust" within the meaning of paragraph (*j*), and their Lordships find it unnecessary to decide whether it was or was not a "settlement" within the meaning of that paragraph, because they are clearly of opinion that if the transfer was not a settlement it was a "disposition of property" within the meaning of paragraph (*j*). Similarly, their Lordships find it unnecessary to decide whether or not the transfer came within sub-paragraph (i) of paragraph (*j*), since they are clearly of opinion that it came within sub-paragraph (ii), whether or not it also came within sub-paragraph (i).

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[20] 32 N.Z.L.R. 929.
[21] [1948] N.Z.L.R. 520.
[22] [1948] N.Z.L.R. 550.

In their Lordships' opinion the transfer exactly answers the description of "a disposition of property which is accompanied "by . . . a contract for any benefit to the deceased for the term "of his life," and consequently the property comprised therein comes within section 5 (1) (*j*) (ii) of the Act of 1921. They will now set out the steps by which they arrive at this conclusion.

First, was the transfer a disposition of property? Counsel for the appellants submitted that the wide definition contained in section 39 did not apply to the words "disposition of "property" in section 5 (*j*), but their Lordships again find it unnecessary to decide this point, since in their view the words in their ordinary meaning are wide enough to include this transfer. As Gresson J. observed in the Supreme Court, the word "disposition" is not a technical word but an ordinary English word of very wide meaning, and their Lordships see no good reason for giving to it a restricted meaning in paragraph (*j*). In their opinion any transfer of property which possesses the characteristics described in sub-paragraph (i) or sub-paragraph (ii) or sub-paragraph (iii) is a disposition to which paragraph (*j*) applies.

Counsel for the appellants argued that if this meaning were attached to the word "disposition" the words "settlement" and "trust" were unnecessary. This is so, but their Lordships agree with Hutchison J. when he observed: ". . . I think that "the legislature might very well, and understandably, have "specially mentioned settlements and trusts as being the types "of disposition that would the more likely be used for the "purposes set out in the sub-paragraphs without thereby intending to exclude from the operation of the provision any other "dispositions that might be used for those purposes."

Turning to sub-paragraph (ii), their Lordships are of opinion that the transfer was undoubtedly accompanied by a contract for a benefit to the deceased for the term of his life, since it was executed "for the consideration of the purchasers executing a "memorandum of mortgage . . . securing to the said Charles "Cameron Ward an annuity for the remainder of his life of the "sum of £650 payable in instalments of £12 10s. 0d. per week" and further securing after the death of the said Charles Cameron Ward a weekly payment to Selina Ward, his wife, during the remainder of her life so long as she should remain unmarried. A mortgage was executed on the same day by the four sons to secure the two annuities.

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It is difficult to imagine circumstances in which a transfer could more plainly be " accompanied by " a contract, and it is obvious that the contract was a contract for a " benefit to the " deceased for the term of his life."

Counsel for the appellants, however, contended that even if the transfer was within the actual words of paragraph (*j*), that paragraph should not be construed as covering a disposition for which full commercial consideration was given. He described the transaction as a commercial one of bargain and sale, and contended that there was to be found in section 5 of the Act a context which should induce their Lordships to hold that such a transaction was outside the scope of the section. Their Lordships cannot accept this argument. They find no such context in the section. On the contrary, a transfer accompanied by a contract for a benefit to the deceased for the term of his life is within the express terms of the section, and their Lordships see no reason for excluding from its operation a case in which the value of the benefit is equal to, or greater than, the value of the property transferred.

Counsel relied strongly on *Lethbridge* v. *Attorney-General*[1] and in particular upon a passage in the judgment of Lord Loreburn L.C. In that case the House of Lords had to consider whether certain policies assigned by a father to his son were " purchased or provided " by the father within the meaning of section 2 (1) (*d*) of the Finance Act, 1894, and Lord Loreburn L.C. said[2]: " The general purpose of this subsection is to " prevent a man escaping estate duty by subtracting from his " means, during life, moneys or money's worth, which, when " he dies, are to reappear in the form of a beneficial interest " accruing or arising on his death. Now it is not subtracting " from his means if the deceased has received a full equivalent " in return for whatever he has laid out."

Counsel pointed out that in the present case the deceased " received a full equivalent " for the Devon Street property. This is so, on the figures set out in paragraph 10 of the case stated, but in their Lordships' view the observations of Lord Loreburn L.C. have no bearing upon the present case. Lord Loreburn was there stating the general purpose of section 2 (1) (*d*) of the Finance Act, 1894. He uses the word " subsection," but it is clear that he was not referring to the whole of subsection 2 (1) but only to sub-paragraph (*d*) thereof. This is clear from the context and, further, his words would be quite inappropriate

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[1] [1907] A.C. 19; 23 T.L.R. 123.

[2] [1907] A.C. 23.

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in reference to (e.g.) sub-paragraph (*a*) of the subsection. Sub-paragraph (*d*) is clearly the forerunner of sub-paragraph (*g*) of section 5 (1) of the New Zealand Act of 1921. The wording of the two sub-paragraphs is identical, save that some words are added at the end of sub-paragraph (*g*) in the New Zealand Act. The problem under each of these two sub-paragraphs is whether the deceased "purchased or provided" certain property, and in *Lethbridge's* case[3] the House of Lords construed the word "provided" as carrying with it the idea of bounty on the part of the deceased. Thus it became relevant to consider whether the deceased had "subtracted from his means," and Lord Loreburn pointed out that a man does not subtract from his means if he receives a full equivalent in return for whatever he has laid out. See also the observation of Lord Macnaghten[4]: "it appears to me that the policies were not 'provided' by the "father within the meaning of that expression in the Act. It "was not by the father's gift, or at his cost, or by means of any "expenditure on his part, that the policies were vested in "the son."

Under section 5 (1) (*j*) (ii) of the New Zealand Act of 1921, however, it is immaterial to consider whether the deceased "purchased or provided" anything. The question is whether he did or did not make a disposition which answers the description contained in sub-paragraph (ii), and for the purpose of answering this question it does not matter whether the deceased did or did not receive "a full equivalent" for the property comprised in the disposition. Sub-paragraph (ii) is concerned only with the nature of the consideration, not with its amount, and its object is, in their Lordships' view, clear. It is to prevent a man escaping estate duty by subtracting property from his means during his life and replacing it with property which comes to an end on his death, with the result that neither the property transferred, nor the property which replaces it, forms part of his estate on his death. That is why the sub-paragraph imposes estate duty on the transferred property if the consideration for the transfer is (e.g.) an annuity for the life of the transferor but not if the consideration is (e.g.) cash.

The result is that in their Lordships' view there is no good reason for implying, in section 5 (1) (*j*) of the Act of 1921, an exception in the case of a purchase for full consideration in money or money's worth, and the view which they have formed is strongly supported by the United Kingdom statutes which preceded the New Zealand Death Duties Act of 1909, wherein this paragraph first appeared. The wording of section 5 (1) (*j*) (ii) of the 1909 and 1921 Acts is obviously based upon section 7 of the United Kingdom Succession Duty Act, 1853 (16 & 17 Vict. c. 51), but the words "not being a bona fide sale," which appear in the last-mentioned section, are omitted from section 5 (1) (*j*) (ii). It is surely reasonable to surmise that they were omitted because the New Zealand provision was intended to extend to a bona fide sale. Similarly, sub-paragraphs (i) and (iii) of section 5 (1) (*j*) of the New Zealand Acts of 1909 and 1921 are obviously based upon section 38 (2) (*c*) of the United Kingdom Customs and Inland Revenue Act, 1881, as amended by section 11 of the Customs and Inland Revenue Act, 1889, and re-enacted by section 2 (1) (*c*) of the Finance Act of 1894. It is significant that although the New Zealand legislation reproduced, in effect, section 2 (1) (*c*) of the Act of 1894 it did not reproduce section 3 (1) of the same Act, which contains an exemption from estate duty in the case of a bona fide purchase for full consideration in money or money's worth.

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[3] [1907] A.C. 19.

[4] Ibid.

Their Lordships have not, of course, overlooked the cases of *Commissioner of Stamp Duties* v. *Russell*[5] and *Craven* v. *Commissioner of Stamp Duties.*[6] In each of these cases it was held, rightly in their Lordships' view, that the transfer of property in question came within section 5 (1) (*j*) (ii) of the Act of 1921. These cases are not, however, of assistance in considering the argument now under review, for the court in each case held that the transaction was not a commercial transaction for full consideration, and did not express any view upon the question whether such a transaction would or would not come within section 5 (1) (*j*) (ii).

Counsel for the appellants suggested that if the respondent's argument was correct great hardship would result in the present case and in other cases, and he quoted the language of Gresson J. in the present case: "If the unrestricted interpretation of the "subsection contended for by the respondent were correct it "would produce results which one hesitates to believe the legis-"lature could have intended. Upon the basis of such a wide "interpretation if a man should expend his capital of say £5,000 "in payment to an insurance company in the purchase of an "annuity that sum would fall to be included as dutiable estate "when he died. He might in fact have consumed the whole

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[5] [1948] N.Z.L.R. 520.

[6] [1948] N.Z.L.R. 550.

"of his capital in this way yet at his death be assessed as having "a notional capital although in fact it had ceased to exist in any "traceable form."

As the case put by the judge as an example may come before the court for consideration in the future, their Lordships express no opinion upon it. They would, however, point out that section 5 (1) (*j*) only applies to property situate in New Zealand at the death of the deceased.

For the reasons which they have stated their Lordships are of opinion that the transaction now in question comes exactly within the words of the statute and considerations of possible hardship in individual cases cannot affect their decision.

Their Lordships will humbly advise Her Majesty that this appeal should be dismissed. The appellants must pay the costs of this appeal.

Solicitors: *Shaen, Roscoe & Co.; Mackrell, Maton & Co.*

C. C.

J. C.*
1955
Dec. 13.

ELIZABETH ANIMA . . . . . APPELLANT;

AND

AKWASI AHYEYE (SUBSTITUTED FOR KWAME DWAA, DECD.) . . . . . . RESPONDENT.

ON APPEAL FROM THE WEST AFRICAN COURT OF APPEAL.

West Africa (Gold Coast)—Jurisdiction—Suit relating to land—Supreme Court—Concurrent jurisdiction with Native Courts—Consent order—"Judgment"—Execution—Discretion—No power to review consent order—Native Courts (Ashanti) Ordinance (Laws of the Gold Coast, 1936 *Rev., c.* 80), *ss.* 7, 35; 1*st Sch.—Courts Ordinance (Gold Coast) (Laws of the Gold Coast,* 1936 *Rev., c.* 4), *ss.* 14, 17 (*b*); 3*rd Sch., Ords.* 41, *r.* 1, 43, *r.* 26.
Practice—Settlement of action—Enforcement.

An action instituted in the Divisional Court of the Supreme Court of the Gold Coast by the respondent against the appellant and others for declaration of title to a house was settled and the terms of the settlement embodied in a minute headed "Court "notes of compromise and order thereon," which concluded "Judgment accordingly" and was signed by the judge. On an application by the respondent to issue execution against the appellant on that consent judgment, the appellant contended, inter alia, (1) that under section 7 and the First Schedule to the Native Courts (Ashanti) Ordinance a Native Court B had jurisdiction over the subject-matter of the case and that consequently the Divisional Court had had no jurisdiction to make the consent order, and (2) that the minute was the record of a compromise agreement upon which proceedings were stayed and not a judgment on which execution could be issued:—

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* *Present*: LORD RADCLIFFE, LORD TUCKER, MR. L. M. D. DE SILVA.

[Reported by J. A. GRIFFITHS, Esq., Barrister-at-Law.]

Held, (1) that the effect of section 14 of the Courts Ordinance of the Gold Coast is to confer on the Supreme Court a wide jurisdiction concurrent with the Native Courts over matters in which the Native Courts have jurisdiction. Section 17 (*b*) requires the Supreme Court not to exercise this concurrent jurisdiction when section 35 of the Native Courts (Ashanti) Ordinance comes into operation, but the concurrent jurisdiction of the Supreme Court is ousted by the operation of section 35 whenever, and only "whenever it shall appear to the Divisional Court . . . that any civil "cause or matter . . . is one properly cognizable by a Native Court "and that a Native Court with jurisdiction to try such civil cause "or matter has been established" (section 35). The court may of its own motion, at any stage of the action before judgment, upon the material placed before it by the parties for purposes other than those of ousting jurisdiction, with or without further material elicited by itself, come to the conclusion that the requisite circumstances exist. It will then be its duty to stop proceedings and refer the parties to the Native Court. It is also open to a party for the purpose of ousting jurisdiction to endeavour to make it appear to the court upon the material before it at any stage, or by placing further material before it, that the requisite circumstances exist and to ask for a decision on the point thus raised. But once judgment is pronounced without the question of ouster of jurisdiction being considered or submitted for consideration, the judgment will be the judgment of a competent court. Accordingly, assuming that this was a case in which the Native Court B had jurisdiction, neither party had endeavoured to oust the jurisdiction of the Supreme Court by bringing the requisite circumstances, if they existed, to the notice of that court, and its judgment was therefore the judgment of a court of competent jurisdiction.

(2) The minute was a minute of a judgment on which execution could issue. The combined effect of the terms and the order was to make the obligations of parties in each of the terms of settlement enforceable by execution unconditionally, that was, enforceable against each of them by execution whether or not the obligations of other parties in other terms had been fulfilled.

Further, the court had no jurisdiction subsequently to review the consent order. The words "judgment or decision given by "him" in Order 41 in the Third Schedule to the Courts Ordinance,

J. C.

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ELIZABETH ANIMA v. AKWASI AHYEYE.

which deals with the power of a court to review a judgment, refer to a judgment or decision of a court for reasons stated, and while a consent judgment or order might in appropriate proceedings be set aside on a ground such as fraud, it could not be reviewed under Order 41.

The court had, under Ord. 43, r. 26, a discretion whether to allow or refuse an application for execution of a judgment after the expiration of six years (the period relevant here), and in the present case there was nothing to show that that discretion had been exercised unjudicially.

Judgment of the West African Court of Appeal affirmed.

APPEAL (No. 6 of 1953) from a judgment of the West African Court of Appeal (Gold Coast Session) (January 9, 1952), affirming a judgment of the Supreme Court of the Gold Coast, Ashanti (sitting as a Divisional Court at Kumasi (March 30, 1950), granting an application of the respondent (plaintiff) to issue execution against the appellant (defendant) on a consent judgment entered in the Divisional Court on March 23, 1939.

By a writ of summons dated November 10, 1938, the plaintiff instituted the present suit against four defendants: (1) Kwame Amankwatia (Bantamahene), (2) Kwame Atta, (3) J. B. Abaidoo, and (4) the appellant, claiming a declaration of title to the compound house situate on leasehold premises No. 23, Bantama, Kumasi, and £120 damages for trespass, wrongful sale, use and occupation. The particulars of claim stated that (i) about 20 years previously the first defendant had given the land on which the compound house stood to the plaintiff, and no ground rent had ever been demanded or paid; (ii) the plaintiff had left the compound house in charge of one John Mensah, and through him had regularly paid the town rate of £2; (iii) on the plaintiff's return to Kumasi he found that the compound house had been sold by the first defendant through the second defendant to the fourth defendant (the appellant), the third defendant being the auctioneer, and (iv) neither the plaintiff nor John Mensah had been served with a writ of summons before the compound house was sold.

The case came before Bannerman J., in the Divisional Court, Kumasi, on March 23, 1939. Before any statement was made by way of defence the parties settled the case upon terms which were recorded in the court notes of the proceedings as follows: "This "case is, by consent, settled as follows:—

"1. The fourth defendant is to give up possession of the "house in dispute within a fortnight from today's date. 2. The "first defendant is to pay the fourth defendant the sum of

"£30 2s. being purchase price. This amount is to be paid within "a fortnight from today's date. 3. The plaintiff is to pay the "first defendant the sum of £11 16s. within a fortnight from "today's date. 4. The plaintiff wholly and unconditionally "abandons his claim for £120 damages in his writ of summons. "5. The plaintiff unconditionally withdraws the case against the "second and third defendants with costs. 6. The plaintiff is to "receive the sum of £12 12s. from the first defendant being "assessed costs herein. 7. The plaintiff is to pay the fourth "defendant the sum of £7 upon production of receipts by the "court for ground rents.

"Judgment accordingly. (Signed) WOOLHOUSE BANNERMAN."

After the signature of Bannerman J., the presiding judge, there followed the signatures of the parties or their representatives except that of the second defendant, who was not present, and as to whom no question had arisen or arose on this appeal.

A motion ex parte by the appellant to set aside the order made on March 23, 1939, or for direction was withdrawn on May 25, 1939. A further motion ex parte by the appellant to construe the order of March 23, 1939, or for direction was withdrawn with leave on July 3, 1939.

On July 12, 1939, the appellant gave notice of a motion praying the court to review the order of March 23, 1939. An affidavit of the appellant in support of the said motion for review, after referring to the previous proceedings and the terms of the consent order, stated, inter alia, as follows: (1) That she was prepared to give up possession of the compound house but the first defendant had failed to pay the £30 2s. to her as ordered by the court. (2) That the plaintiff had disappeared and the appellant could not find his whereabouts to pay her the £7 ground rents as ordered by the court. (3) That the appellant was being pressed for payment of ground rents and water rates in respect of the house. (4) That in view of the failure of the first defendant and the plaintiff respectively in complying with the order of the court the appellant prayed for special leave to review the order of March 23, 1939.

The appellant's motion for review was heard before Bannerman J. on July 24, 1939, and the judge's decision thereon was recorded as follows: "*By the court*: If the first defendant has "failed within the time-limit to pay the £30 2s. to the fourth "defendant then the fourth defendant should retain possession "of the house. (Signed) WOOLHOUSE BANNERMAN, Judge."

On November 27, 1940, the plaintiff gave notice of a motion for an order to restrain the appellant from alienating the property in dispute. In his affidavit in support of the motion the plaintiff referred to the previous proceedings and stated, inter alia, that he had a few days after the order of March 23, 1939, tendered "through the first defendant," the sum of £6 15s. to be given to the appellant but that she had refused to accept it. On December 3, 1940, the plaintiff's motion to restrain the appellant from alienating the property was heard by Fuad J., and dismissed.

On February 16, 1950, the plaintiff gave notice of a motion for leave to proceed to execution against the appellant, and for the substitution of the name of Nana Kwaku Gyawu III Bantamahene for that of the first defendant (now deceased), in respect of the "judgment" of March 23, 1939. In his affidavit in support of the motion the plaintiff stated, inter alia, that the judgment against the appellant had remained unsatisfied for over six years, and the plaintiff now desired to proceed to execution against the appellant, and, that execution had not been issued owing to the plaintiff's illness.

On February 22, 1950, the plaintiff's motion for leave to proceed to execution was heard, before Jackson J., and was dismissed. The judgment was recorded as follows: "*Court*: "There is nothing in the judgment upon which the plaintiff can "proceed to execution against either Elizabeth Anima or Kwame "Amankwatia and it follows his successor in title. Without "calling upon the defendants I dismiss the motion. The defen"dants waive any question of costs.

"(Signed) J. JACKSON, Judge."

On March 13, 1950, the plaintiff gave notice of a motion for review of the order of February 22, 1950. In his affidavit in support of his motion to review the plaintiff stated that he approached the appellant on several occasions to produce receipts for ground rents, and to accept the sum of £7 ordered to be paid upon production of receipts for ground rents by the "consent "settlement" of March 23, 1939; that he was still prepared to pay the said sum of £7 or any sum or sums since accruing if ordered by the court so to do, and that the appellant was still in possession of the premises.

An affidavit sworn by one Akosua Mansah, described as "the "mother and lawful attorney" for the appellant, indicated that the appellant relied upon the order of Bannerman J. of July 24, 1939, in answer to the plaintiff's application for leave to proceed to execution.

By a judgment dated March 30, 1950, Jackson J. gave his decision on the plaintiff's motion for review of the judgment of February 22, 1950. The judge decided that upon payment into court of a sum of £30 2s. to be deposited in favour of the appellant, the plaintiff should have leave to issue execution against the property No. 23, Bantama, Kumasi.

The appellant appealed against the decision of Jackson J. of March 30, 1950, to the West African Court of Appeal. In her grounds of appeal she relied on the order of Bannerman J. of July 24, 1939, and, inter alia, contended that the judgment appealed against was in effect a review of the said order of July 24, 1939, and that it was not competent for Jackson J. to review or vary the order of another judge of concurrent jurisdiction.

On January 9, 1952, the West African Court of Appeal (Foster-Sutton P., Coussey and Manyo-Plange JJ.) upheld the judgment of Jackson J. given on March 30, 1950.

On June 27, 1952, final leave to appeal to Her Majesty in Council was granted. By an order of revivor made on June 24, 1954, Her Majesty in Council ordered that the respondent should be substituted in place of the plaintiff, now deceased.

1955. October 25, 26, 27. *Gilbert Dold* and *Miss J. R. Bisschop* for the appellant. The first ground of appeal is that there was a Native Court B with jurisdiction over the subject-matter of the present case, and that accordingly Bannerman J., sitting in the Divisional Court of the Supreme Court of the Gold Coast, had no jurisdiction to make the consent order of March 23, 1939. [Reference was made to sections 14 and 17 of the Courts Ordinance of the Gold Coast and to sections 1, 2, 3, 4, 7, 35 and Schedule I to the Native Courts (Ashanti) Ordinance (Laws of the Gold Coast, 1936 Revision).]

Disputes concerning land in Ashanti are solely cognizable by the Native Courts if all the parties are natives within the meaning of section 2 of the Native Courts (Ashanti) Ordinance. [Reference was made to *Agyeman* v. *Panin*,[1] *Mensah* v. *Cobbina*[2] and *Koffee* v. *Chief Kwesi Brento*.[3]] When it appears on the face of the writ that the suit relates to the possession of land and that the parties to it are natives, the Divisional Court has no jurisdiction but to refer the parties to the Native Court immediately the suit is called on: see section 35 of the Native Courts (Ashanti)

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[1] (1940) 6 W.A.C.A. 11.

[2] (1939) 5 W.A.C.A. 108, 110.

[3] (1944) 10 W.A.C.A. 92.

Ordinance and *Djabartey* v. *Benkumhene Antwi Awua II.*[4] Since the Divisional Court had no jurisdiction, the parties to the present suit could not confer jurisdiction upon it either by consent or otherwise.

The opening words of section 35 of the Native Courts Ordinance: " Whenever it shall appear to . . . the Divisional Court " . . . that any civil cause or matter brought before it is one " properly cognizable by a Native Court . . ." are not to be taken subjectively but objectively, and should be construed as meaning " Whenever it shall appear *or ought to have appeared* . . ." In the present case it ought to have appeared to the Divisional Court that the suit was one within the jurisdiction of a Native Court, for (*a*) it related to the possession of land, and (*b*) the names of all the parties were plainly native names. It follows, therefore, that the proceedings before the Divisional Court were null and void. [Reference was made to *Archie Kwow* v. *Ohene Essien Eku II*[5] and *Kojo Amuakwa* v. *Kwamin Anyan.*[6]]

In the alternative, it is submitted that the minute of March 23, 1939, was the record of a compromise agreement upon which proceedings were stayed, and not a judgment upon which execution could be issued. The minute comes within the ambit of Ord. 40, r. 4, and not of rule 6, of the Courts Ordinance. On the various forms of compromise, see *per* Slade J. in *Green* v. *Rozen.*[7] [Reference was also made to *Dashwood* v. *Dashwood.*[8]]

Further, Bannerman J.'s decision in respect of the appellant's motion to review the order of March 23, 1939, recorded on July 24, 1939, namely, " If the first defendant has failed within the " time-limit to pay the £30 2s. 0d. to the fourth defendant, then " the fourth defendant should retain possession of the house," precludes the respondent from proceeding to execution on the said order of March 23, 1939, for it amounts to an unconditional order that " the fourth defendant [the appellant] should retain posses- " sion of the house." As to the court's powers of review, see Order 41 in the Third Schedule to the Courts Ordinance.

Finally, it is submitted that Jackson J. wrongly exercised his discretion in granting leave to the respondent to execute the judgment of March 23, 1939, after the lapse of more than six years, since he failed to take into consideration the plaintiff's laches and acquiescence. [Reference was made to Order 43 in the Third Schedule to the Courts Ordinance, to *In re Clements*,[9] and also to section 91 of the Supreme Court Ordinance and to *Lamb (W. T.) & Sons* v. *Rider.*[10]]

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[4] (1938) 4 W.A.C.A. 202, 206–208.

[5] (1934) 2 W.A.C.A. 180.

[6] (1936) 3 W.A.C.A. 22.

[7] [1955] 1 W.L.R. 741.

[8] [1927] W.N. 276.

[9] [1901] 1 K.B. 260.

Ralph Millner for the respondent. On the question of jurisdiction, it is submitted that the essential error in the appellant's argument is that on the proper construction of the relevant legislation it is impossible to hold that the Native Courts have exclusive jurisdiction; on its true construction it will be found that the Supreme Court has concurrent jurisdiction with the Native Courts. [Reference was made to sections 14, 17, 70, 74 and 76 of the Courts Ordinance.] The Supreme Court possesses all the jurisdiction of the High Court in England. The Ordinance provides that English law applies. The Supreme Court possesses jurisdiction, but by section 17 it is directed not to *exercise* it in respect of questions usually referred to the Native Courts. Section 7 (1) of the Native Courts (Ashanti) Ordinance does not state that the Native Courts have exclusive jurisdiction but that they have concurrent jurisdiction with the Supreme Court in so far as the Native Courts have any jurisdiction at all.

The present case falls within *Koffee* v. *Chief Kwesi Brento,*[11] for it never "appeared" to the court within the meaning of section 35 of the Native Courts Ordinance that there was a suit which was referable to a Native Court, since the action was compromised before coming on for trial. Further, there is a presumption that a superior court acts within the scope of its jurisdiction: see Broom's Legal Maxims, 9th ed., p. 616, 10th ed., p. 647; *Peacock* v. *Bell & Kendal*[12]; *Howard* v. *Gosset.*[13] [Reference was also made to *Archie Kwow* v. *Ohene Essien Eku II*[14]; *Djabartey* v. *Benkumhene Antwi Awua II*[15]; *Mensah* v. *Cobbina*[16]; *Agyeman* v. *Panin*[17]; *Tsuru* v. *James Nortei Yebuah*[18]; *Akisatan Apena of Iporo* v. *Akinwande Thomas.*[19]]

On the assumption that the Supreme Court had jurisdiction over the subject-matter of the present case, it is submitted that the minute of March 23, 1939, was a consent judgment, for the words "judgment accordingly" plainly suggest that it is a judgment in the terms prefixed to those words. If the terms are read out to the court, and the parties request those terms to be incorporated in the judgment, *all those* terms are incorporated in the judgment and there remains no contractual liability outstanding between the parties. *Dashwood* v. *Dashwood*[20] is distinguishable, for in that case there was an undertaking.

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[10] 64 T.L.R. 530; [1948] 2 All E.R. 402.

[11] 10 W.A.C.A. 92, 96.

[12] (1667) 1 Saund. 69.

[13] (1845) 10 Q.B. 359, 453.

[14] 2 W.A.C.A. 180.

[15] 4 W.A.C.A. 202, 207.

[16] 5 W.A.C.A. 108.

[17] 6 W.A.C.A. 11.

[18] (1941) 7 W.A.C.A. 172, 173.

[19] [1950] A.C. 227.

Order 41 in the Third Schedule to the Courts Ordinance does not apply to a consent judgment. Accordingly, the order made on review by Bannerman J. on July 24, 1939, was a nullity. Ord. 41, r. 4, is peremptory; the court having seen the terms is under a bounden duty, provided that they are lawful terms, to enter judgment accordingly. If there were power to review a *consent* judgment, it necessarily follows that all parties must *agree* to the review.

It is submitted that a consent judgment is not within the ambit of the order: see, for example, rule 1, which concerns appeals. Since one cannot appeal against a consent judgment, it is plain that this rule has no application to such a judgment. Generally, a consent judgment can be set aside on the grounds of fraud or mistake, but it cannot be appealed from. [Reference was made to *Australasian Automatic Weighing Machine Co.* v. *Walter*[21]; *Huddersfield Banking Co. Ltd.* v. *Henry Lister & Son Ltd.*[22]; *In re South American and Mexican Co.*,[23] and *Kinch* v. *Walcott*.[24]] If the above contention be right, it follows that the order of July 24, 1939, was made without jurisdiction, since it attempted to give the order of March 23, 1939, a different effect.

Finally, on the question whether Jackson J. wrongly exercised his discretion in granting leave to the respondent to execute the judgment of March 23, 1939, after the lapse of more than six years, it is submitted that the appellant cannot show such a wrongful exercise of it that the Board will interfere, albeit the West African Court of Appeal refused so to do. The Board will not interfere merely because there are certain weaknesses in the exercise by the judge of the discretion vested in him. [Reference was made to Ord. 43, r. 26, in the Third Schedule to the Courts Ordinance.]

Dold, in reply, referred to section 36 of the Native Courts (Ashanti) Ordinance and to section 40 of the County Courts Act, 1934.

December 13. The judgment of their Lordships was delivered by MR. L. M. D. DE SILVA. This is an appeal from a judgment of the West African Court of Appeal dated January 9, 1952, affirming a judgment of the Supreme Court of the Gold Coast, Ashanti (sitting as a Divisional Court at Kumasi), dated March 30, 1950, granting an application of the respondent to issue execution against the appellant on a consent judgment entered in the Divisional Court on March 23, 1939.

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[20] [1927] W.N. 276.

[21] [1891] W.N. 170.

[22] [1895] 2 Ch. 273, 275, 277, 283, 284.

[23] [1895] 1 Ch. 37, 45.

[24] [1929] A.C. 482, 493.

The respondent instituted the action in the Divisional Court on November 10, 1938, against the appellant and three other defendants for declaration of title to a house and for £120 damages "for wrongful sale, trespass, use and occupation." He alleged in the particulars of claim filed with the writ that the first defendant had "given" him a land "about 20 years" previously and that the first defendant had (date unstated) sold the house to the fourth defendant (the present appellant). The second and third defendants appear to have been made parties on the basis that they had been concerned with the sale. It will appear that it is not necessary to determine what precisely was the basis of the respondent's action against each or all of the defendants.

Before any statement was made by way of defence the parties settled the case, and the following minute was made by the court on March 23, 1939, under the heading "Court Notes of "Compromise and Order thereon."

"This case is, by consent, settled as follows:—

"1. The fourth defendant is to give up possession of the house "in dispute within a fortnight from today's date.

"2. The first defendant is to pay the fourth defendant the "sum of £30 2s. being purchase price. This amount is to be "paid within a fortnight from today's date.

"3. The plaintiff is to pay the first defendant the sum of "£11 16s. within a fortnight from today's date.

"4. The plaintiff wholly and unconditionally abandons his "claim for £120 damages in his writ of summons.

"5. The plaintiff unconditionally withdraws the case against "the second and third defendants with costs.

"6. The plaintiff is to receive the sum of £12 12s. from the "first defendant being assessed costs herein.

"7. The plaintiff is to pay the fourth defendant the sum of "£7 upon production of receipts by the court for ground rents.

"Judgment accordingly. (Signed) WOOLHOUSE BANNERMAN."

After the signature of Woolhouse Bannerman J., the presiding judge, there followed the signatures of the parties or their representatives except that of the second defendant who was not present. No question regarding him arose or arises on this appeal.

It was argued by the appellant that there was a Native Court with jurisdiction over the subject-matter of the case and that consequently the Divisional Court of the Supreme Court had no jurisdiction to make the order set out in the preceding paragraph. It is necessary in dealing with this argument to consider the combined effect of section 7 of the Native Courts (Ashanti) Ordinance (chapter 80, Laws of the Gold Coast, 1936 Revision, volume II, p. 1249), and of sections 14 and 17 of the Courts Ordinance of the Gold Coast (Laws of the Gold Coast, volume I, pp. 31 and 32). Section 7 of the Ashanti Native Courts Ordinance is to the following effect:—

" 7. (1) Every Native Court shall have full jurisdiction and " power, to the extent set forth in the order establishing it and " subject to the provisions of this Ordinance in all civil and " criminal cases in which all the parties are natives and the " defendant was at the time when the cause of action arose " resident or being within the jurisdiction of the court or in the " case of a criminal matter is accused of having, wholly or in " part within the jurisdiction of the court, committed or been " accessory to the committing of an offence.

" (2) For the purposes of the preceding subsection the governor " may by order grade Native Courts and prescribe the jurisdiction " and power which is to be set forth in the orders establishing " the Native Courts of each grade.

" Except in so far as the governor may by such an order " otherwise direct there shall be four grades of Native Courts, " namely, grades A, B, C, and D, and the jurisdiction and " power which shall be set forth in the orders establishing Native " Courts of these grades shall not without the permission of the " governor exceed those prescribed in the First Schedule."

Under the First Schedule (p. 1262) to the Native Courts Ordinance Native Courts of Grade B have " Such jurisdiction in " suits relating to the ownership, possession, or occupation of " land within the area of its jurisdiction as may be stated in the " order establishing the Native Court." It is contended that, by reason of the provision just stated, a Native Court of Grade B had jurisdiction over the subject-matter of this case.

Section 14 of the Courts Ordinance of the Gold Coast is to the following effect: " The Supreme Court shall be a superior court " of record, and in addition to any other jurisdictions conferred " by this or any other Ordinance, shall, within the Gold Coast "and subject as in this Ordinance mentioned, possess and exercise all the jurisdiction powers and authorities which are vested in or capable of being exercised by His Majesty's High Court of Justice in England." (There is a proviso which is not material.)

Section 17 is to the following effect: "Notwithstanding anything in this Ordinance contained the Supreme Court shall not exercise jurisdiction:— . . . (*b*) in Ashanti in any civil cause or matter subject to the provisions of section 35 of the Native Courts (Ashanti) Ordinance, save and except in accordance with the proviso to such section, or in any cause or matter within the jurisdiction conferred on the Ashanti Chief Commissioner's Court by sections 62 and 64 of this Ordinance." (Subsections (*a*), (*c*) and (*d*) are not material.)

Section 35 of the Native Courts Ordinance referred to in section 17 (*b*) set out above is to the following effect: "Whenever it shall appear to the Chief Commissioner's Court or the Divisional Court, or a Magistrate's Court that any civil cause or matter brought before it is one properly cognizable by a Native Court and that a Native Court with jurisdiction to try such civil cause or matter has been established under the provisions of this Ordinance, such Chief Commissioner's Court or Divisional Court or Magistrate's Court as the case may be shall stop the further progress of such civil cause or matter before it and refer the parties to a competent Native Court as the case may be; and the court shall thereupon order such costs as it shall deem fit." (There follows a proviso giving a list of cases in which "the obligations as to stoppage and reference" are not to apply. Their Lordships do not find it necessary to refer to this proviso.)

The appellant argued that the present suit was one "relating to the ownership, possession or occupation of land" within the meaning of those words in the Schedule to the Courts Ordinance set out above, and that there existed a Native Court Grade B which had jurisdiction over the subject-matter of this case. The question whether the suit was one "relating to the ownership, possession or occupation of land" was disputed by the respondent, but assuming that it was, it does not appear on the face of the record that "a Native Court with jurisdiction" over the subject-matter of this case "has been established" (section 35). The record does not contain an "order establishing" (section 7 (2) above) such a court, and consequently if such a court has been established the extent of its jurisdiction is unascertainable by reference to the record. Furthermore it does not appear on the face of the record, except in so far as it can be inadequately suggested from their names, that all the parties were natives.

It is said however by the appellant that the facts were not in dispute when the point was taken for the first time before the West African Court of Appeal, although there is nothing in the judgment of that court or elsewhere in the record which supports that suggestion. Their Lordships do not find it necessary to consider further what the facts were in view of the opinion they have formed as to the bearing of the sections set out above upon this case.

Their Lordships are of opinion that the effect of section 14 is to confer on the Supreme Court a wide jurisdiction including jurisdiction concurrent with the Native Courts over matters in which the Native Courts have jurisdiction. Section 17 (above) requires the Supreme Court not to exercise this concurrent jurisdiction when section 35 (above) comes into operation. It is necessary to determine exactly when, if at all, section 35 does so in any particular case.

Their Lordships are of the view that the concurrent jurisdiction of the Supreme Court is ousted by the operation of section 35 whenever, and only " whenever, it shall appear to the Divisional " Court that any civil cause or matter is one properly cognizable " by a Native Court and that a Native Court with jurisdiction " to try such civil cause or matter has been established " (section 35). The court may of its own motion, at any stage of the action before judgment, upon the material placed before it by the parties for purposes other than those of ousting jurisdiction, with or without further material elicited by itself, come to the conclusion that the requisite circumstances exist. It will be then its duty to stop proceedings and refer the parties to the Native Court. It is also open to a party for the purpose of ousting jurisdiction to endeavour to make it appear to the court upon the material before it at any stage, or by placing further material before it, that the requisite circumstances exist, and to ask for a decision upon the point thus raised. But once judgment is pronounced without the question of ouster of jurisdiction being considered or submitted for consideration, the judgment will be the judgment of a competent court. If it were otherwise, it would be open to a party conscious of the existence of the requisite circumstances not to bring them to the notice of the court until judgment had been pronounced, and then, if the judgment be adverse to him, to seek to defeat the judgment on the ground of lack of jurisdiction. Their Lordships are of opinion that section 35 has been framed to avoid such a possibility and that, though in the generality of cases jurisdiction depends on the existence or absence of prescribed circumstances whether or not the court is conscious of them, under section 35 jurisdiction is ousted only when the prescribed circumstances have become apparent, or have been made apparent, to the court. In the case before their Lordships the trial judge proceeded to judgment and it must be presumed that it did not appear to him that the circumstances requisite for an ouster of jurisdiction were present. Neither party endeavoured to oust jurisdiction by bringing such circumstances, if they existed, to his notice. Their Lordships are therefore of opinion that the judgment of the trial court was the judgment of a court of competent jurisdiction.

It was next argued by the appellant that the minute set out in the preceding paragraph was the record of a compromise agreement upon which proceedings were stayed, and not a judgment upon which execution could be issued. It was further argued that in any case the obligation of the fourth defendant to give up the house under clause 1 (above) did not arise until she had been paid £30 2s. by the first defendant under clause 2. Their Lordships do not agree with either of these arguments.

Their Lordships are of the opinion that the minute of March 23, 1939, is the minute of a judgment on which execution can issue. The minute contains the terms of settlement followed by the order "judgment accordingly" of the court. The combined effect of the terms and the order is, in their Lordships' opinion, to make the obligations of parties in each of the terms of settlement (as contain them) enforceable by execution unconditionally, that is to say, enforceable against each of them by execution whether or not the obligations of other parties in other terms have been fulfilled. The benefit to accrue to each party is defined and, if he does not receive it, the right to obtain it by proceeding to execution is given to him. Parties no doubt were induced to undertake obligations, partly at least, by the fact that other parties also undertook obligations. But the fulfilment of obligations in any one term of settlement was not made a condition for the performance of obligations in any other. Thus regarded, the duty of the fourth defendant to give up possession of the house within a fortnight of March 30, 1939, was not dependent on the payment to her of £30 2s. by the first defendant. If the first defendant failed to pay the money within the stipulated fortnight the fourth defendant could issue execution against him, but her duty to give up the house remained unaffected.

Their Lordships are of the view that this is the true meaning of the terms of settlement. It could be no other unless words are read into the terms making the performance of the first term conditional upon the performance of the second. It is not admissible to introduce such words.

Those concerned with the settlement of actions might with advantage study the judgment of Slade J. in the case of *Green* v. *Rozen*,[1] where will be found a discussion on the advantages and disadvantages of the different formulae which can be used for this purpose.

The next point argued by the appellant is that a note recorded by Bannerman J. on July 24, 1939, namely, "If the first "defendant has failed within the time-limit to pay the £30 2s. 0d. "to the fourth defendant then the fourth defendant should retain "possession of the house" precludes the respondent from proceeding to execution on the earlier order of March 23, 1939. The note recorded was on an application by the appellant for a "review" of the order of March 23, 1939. It had been preceded by two applications by the appellant, both of which had been withdrawn. The first of these was an application made on May 11, 1939, asking on various grounds that the order of March 23, 1939, be set aside "or for direction." It was withdrawn on May 25, 1939. The next was an application made on June 16, 1939, "to construe the order made on March 23, 1939, "or for direction." It was withdrawn on July 3, 1939. An application was then made on July 12, 1939, "to review" the order of March 23, 1939, and the note recorded on July 24, 1939, mentioned above was the result of that application. The appellant argues that the expression of the view amounts to an unconditional order that "the fourth defendant should retain "possession of the house." This is disputed by the respondent. Their Lordships do not find it necessary to decide this question as they agree with the Court of Appeal that the learned judge had no jurisdiction to review the order of March 23, 1939, which was a consent order. The power of a court to review a judgment is contained in Order 41 in the Third Schedule to the Courts Ordinance (vol. 1, p. 123), and is to the following effect: "Any "Judge, Magistrate, or other judicial officer, may, upon such "grounds as he shall consider sufficient, review any judgment or "decision given by him (except where either party shall have "obtained leave to appeal, or a reference shall have been made

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[1] [1955] 1 W.L.R. 741; [1955] 2 All E.R. 797.

"upon a special case, and such appeal or reference is not with-"drawn), and upon such review it shall be lawful for him to open "and re-hear the case wholly or in part, and to take fresh "evidence, and to reverse, vary, or confirm his previous judg-"ment or decision, or to order a non-suit."

Their Lordships are of opinion that in using the words "judgment or decision given by him" the legislature contemplated a judgment or decision formulated by a court for reasons, stated or unstated, which the court had thought to be sound. A court may review the judgment or decision when it thinks that some or all of those reasons need further consideration. The reasons for a consent judgment, frequently, as in this case (vide heading of proceedings of March 23, 1939, above), a matter of compromise, may never be known to the court and once acted upon their soundness is not a matter for review by a court. A consent judgment or order may no doubt in appropriate proceedings be set aside on various grounds such as fraud, but it may not be reviewed under Order 41. Their Lordships think that the note of July 24, 1939, whether or not it purported to be itself an order was made without jurisdiction and in no way affected the order of March 23, 1939.

It was finally argued that the trial court had not exercised its discretion correctly in granting leave to the respondent to execute the judgment of March 23, 1939, after the lapse of more than six years and that the Court of Appeal had erred in confirming the order of the trial court.

An application for execution of a judgment after the expiration of six years is governed by rule 26 of Order 43 (Schedule to the Courts Ordinance, vol. 1, Laws of the Gold Coast, p. 129), which is in the following terms: "As between the original parties "execution, otherwise than against the person, may issue at any "time within six years, and, against the person, at any time "within two years from the date of the decree. After such "periods respectively execution shall not issue without leave of "the Court, but no notice to the debtor before applying for such "leave shall be necessary."

It is clear that a court has a discretion whether to allow or refuse the application. It is for the court after considering all the circumstances that may be relevant judicially to exercise its discretion. The trial court has exercised it in the present case in favour of the respondent and the Court of Appeal has seen no reason to interfere with the trial court's order. In their Lordships' opinion nothing placed before them has been sufficient to sustain the argument that the courts below have exercised their discretion unjudicially, although the relevant material to be found in the record is somewhat scanty.

The trial court in the course of dealing with the application said of the first defendant that a failure by him to pay the appellant the sum undertaken by him to be paid "savours strongly of "collusion between himself and Elizabeth Anima" (the appellant). Their Lordships do not consider that the available evidence justified the expression of this view. The imputation ought not to have been made. But, even so, the fact remains that the judgment was unsatisfied, and in the matter of the exercise of discretion the only ground of substance urged by the appellant against the issue of execution appears to be that she had spent £400 in reconditioning the house. The trial court dealt with this point by stating that, as against this, the appellant had had the use of the house and profits therefrom for over 10 years. There was probably substance in what the trial court said, but it does not appear from the record what these profits were, or might have been, or even what the size and state of the house was when the appellant entered into occupation. The allegation that she spent £400, however, does not appear in her affidavit of March 16, 1950, filed for the purpose of resisting the application for execution, and there does not appear to be any sworn testimony supporting it. It does not appear to their Lordships that the fact that she spent £400 on the house, if fact it was, was felt by the appellant to be a strong reason for not surrendering the house. Their Lordships do not think that a case has been made out for sending the case back for a fuller investigation of the point whether, in all the circumstances, the appellant is now sufficiently compensated by the payment to her of the £30 2s. 0d. ordered in the judgment of March 23, 1939.

It ought perhaps to be mentioned that the trial court had on February 22, 1950, refused an application for execution of the judgment of March 23, 1939. The reason given for the refusal was that "There is nothing in the judgment (of March 23, 1939), "upon which the plaintiff can proceed to execution." Their Lordships do not think it necessary to offer any observations upon this view other than those already made earlier in dealing with the meaning and effect of the judgment of March 23, 1939. It was upon a review of its order of February 22, 1950, that the order under appeal was made on March 30, 1950.

In the course of the argument the appellant applied to place by affidavit further material before their Lordships upon the question whether there had been collusion between herself and the first defendant. No satisfactory reason was given as to why it was not sought to place this evidence before the Court of Appeal for consideration whether it should be admitted or not. Their Lordships saw no reason why they should take the exceptional course of allowing the evidence to be produced for the first time before them and accordingly refused the application. This refusal has made no difference to the appellant, because, as already stated, their Lordships have formed the view that there were no sufficient grounds for holding that there had been collusion between the first defendant and the appellant.

For the reasons they have given their Lordships will humbly advise Her Majesty that the appeal be dismissed. The appellant will pay the respondent the costs of this appeal.

Solicitors: *A. L. Bryden & Williams; T. L. Wilson & Co.*

[HOUSE OF LORDS.]

ATTORNEY-GENERAL . . . . . . APPELLANT;

AND

PARSONS AND OTHERS . . . . . . RESPONDENTS.

H. L. (E.)*

1955
Nov. 14, 16, 17, 21;
Dec. 19.

Mortmain—Lease—Forfeiture—Residue of term—Assignment to foreign company—"Assurance of lands in mortmain"—Whether automatic forfeiture to Crown—Land registration—Effect of registering assignment—Statute De Viris Religiosis, 1279 (7 *Edw.* 1, *stat.* 2, *c.* 1) *—Mortmain and Charitable Uses Act,* 1888 (51 & 52 *Vict. c.* 42), *s.* 1 (1)*—Mortmain and Charitable Uses Act,* 1891 (54 & 55 *Vict. c.* 73), *s.* 3*—Land Registration Act,* 1925 (15 *Geo.* 5, *c.* 21), *s.* 23 (1).

In 1953 the lease of premises for 99 years expiring in 1957 was transferred to a company registered in the Republic of Ireland, and it was registered at the Land Registry as proprietor for valuable consideration thereof. The company had not delivered to the Registrar of Companies any documents for registration under Part X of the Companies Act, 1948, nor had it been granted a licence to hold land in mortmain. The Crown took no steps to enter into possession of the land and claimed not to be liable on covenants in the lease:—

Held (Lord Morton of Henryton dissenting), that, even assuming the transfer of the lease to the company to be an assurance of land "in mortmain" within section 1 (1) of the Mortmain and Charitable Uses Act, 1888, that subsection did not impose an automatic forfeiture of the land to the Crown, but merely gave it a right to enter on and hold the land. "Forfeited" meant "liable to be forfeited." Accordingly, since the Crown had taken no steps to enforce any forfeiture, it was not liable on the covenants in the lease.

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* *Present*: EARL JOWITT, LORD PORTER, LORD MORTON OF HENRYTON, LORD MACDERMOTT and LORD COHEN.

Per Lord Morton of Henryton and Lord Cohen. The transfer of the lease was an assurance of land "in mortmain" within the meaning of section 1 (1).

Per Lord MacDermott. That section applies to leases, but the effect of the words "in mortmain" is to exonerate the short term; the fag-end of the lease now in question was incapable of alienation in mortmain.

Semble (*per* Earl Jowitt). Section 23 of the Land Registration Act, 1925, affects Her Majesty's right of forfeiture; (*per* Lord Morton of Henryton) aliter.

Morelle Ltd. v. *Waterworth* [1955] 1 Q.B. 1; [1954] 2 All E.R. 673 disapproved.

Morelle Ltd. v. *Wakeling* [1955] 2 Q.B. 379; [1955] 1 All E.R. 708 considered.

Decision of the Court of Appeal [1955] Ch. 664; [1955] 2 All E.R. 466 reversed.

APPEAL from the Court of Appeal (Evershed M.R., Hodson and Romer L.JJ.).

This was an appeal from an order of the Court of Appeal dated May 10, 1955, confirming an order of the Chancery Division (Harman J.) dated April 6, 1955, in favour of the respondents. The respondents were (1) Sidney James Parsons, Harry Tinley, Leonard Graham Parsons, Barbara Rait-Kerr, Doris Crawford, the Rev. Austin Lovell Bryan, Roland Victor Besell, William George Boyce, Arthur Booth Pratt, Richard Nathaniel Dancer Keep, Edward Thomas Deverall, Josiah William Burrows, Aubrey Hoyland, Pamela Thomas and Frank Gordon Poole, the trustees of the Odiham Consolidated Charities, of whose trust premises the freehold reversion expectant on the term granted by a lease of certain houses in Hammersmith formed part; (2) Arffe Ltd., a company registered in the Republic of Ireland, to which the lease had been transferred, and (3) the Official Trustee of Charity Lands, in whom the freehold reversion expectant was vested. The appellant, the Attorney-General, was plaintiff in the proceedings which were commenced by originating summons dated March 10, 1955, in the Chancery Division, and the trustees and the company were defendants. The Official Trustee of Charity Lands was added as a defendant by order of the Court of Appeal.

H. L. (E.)

1955

ATTORNEY-GENERAL v. PARSONS.

The facts, stated by Earl Jowitt and Lord Morton of Henryton, were as follows: By a lease dated August 11, 1862, John Cave and others demised a number of houses in Hammersmith to one John Murray for a term of 99 years from September 29, 1858, subject to the rent thereby reserved and to the covenants on the part of the lessee therein contained. The freehold reversion expectant upon the determination of the term was at the time of these proceedings vested in the seventeenth respondent, the Official Trustee of Charity Lands, by virtue of a scheme of the Charity Commissioners sealed on June 4, 1886, for the Odiham Consolidated Charities. The first 15 respondents were the present managing trustees of those charities.

The leasehold title to the demised premises was registered at the Land Registry on October 12, 1917, under Title No. 188069, and had since that date remained so registered as a good leasehold title. On February 21, 1953, the sixteenth respondent, Arffe Ltd., was registered as proprietor of the demised premises at the Land Registry as a transferee for a valuable consideration, the price paid being stated as £75. On that date less than five years of the leasehold term remained. The transfer of the premises to Arffe Ltd. was not produced in these proceedings, but it was assumed that it was in the usual form of a transfer of land registered with good leasehold title and that nothing turned upon its terms, since it had not been included in the record.

Arffe Ltd. was a company incorporated in the Republic of Ireland on July 26, 1950, and had its registered office in Dublin. The company had not delivered to the Registrar of Companies any documents for registration under Part X of the Companies Act, 1948; consequently it had not got the statutory power to hold land which was conferred upon companies incorporated under that Act, and it had not been granted a licence to hold land in mortmain.

In or before the month of March, 1955, the 15 respondent trustees alleged that there had been breaches of the covenants on the part of the lessee contained in the lease of 1862 and that the leasehold term created by that lease had become vested in the Crown by virtue of section 1 of the Mortmain and Charitable Uses Act, 1888. The latter allegation was disputed by the Crown. In those circumstances, on March 10, 1955, the Attorney-General took out an originating summons asking by paragraph 1 whether the land comprised in the lease of 1862 (a) was vested in Arffe Ltd. for the residue remaining unexpired of the term created by the lease of 1862, or (b) ought to be deemed to be vested in Arffe Ltd. for the unexpired residue of the said term, or (c) was vested in Her Majesty the Queen for the said unexpired residue. Paragraph 2 of the summons raised a further question, expressed as follows: "If the answer to paragraph 1 (*c*) hereof be "affirmative whether upon the true construction of the Mortmain "and Charitable Uses Acts, 1888 and 1891, and of the Queen's "Remembrancer Act, 1859, Her Majesty the Queen is in the "events which have happened now liable under the lessee's "covenants contained in the said lease notwithstanding that Her "Majesty has not nor has anyone on her behalf entered into "possession of any part of the said land nor has there been any "inquisition made or office found in relation to Her Majesty's "title to the said land or any part thereof."

It was common ground that Her Majesty had taken no steps to enter into possession of the land in question; it was, indeed, conceded that, so far as was possible, Her Majesty had disclaimed any interest in the land.

Harman J. held that the land was now vested in Her Majesty for the unexpired residue of the term created by the lease and that Her Majesty was liable under the covenants. The Court of Appeal affirmed his decision.

Sir Reginald Manningham-Buller Q.C., A.-G., Geoffrey Cross Q.C. and *Denys Buckley* for the appellant. The revolutionary decision in *Morelle Ltd.* v. *Waterworth*[1] is challenged. If it were rightly decided, serious consequences would ensue in that very many onerous claims would be made against the Crown, which was not a party to it or represented. This is a test case.

The respondents contend that there is an automatic forfeiture here. That is contested, but, even if there is, it is the freeholders who lose their interest, for the fee simple and not the leasehold interest is forfeited.

In summary, the Crown contends (1) that the lease is not automatically forfeited to and vested in the Crown; (2) that the Crown has always had and still has an option to decide whether to exercise its right of forfeiture; (3) that there must be inquisition or office found to establish the Crown's title; (4) that a lease for 99 years does not come within the Mortmain Acts; (5) that if a lease, when granted, does not offend against the Mortmain Acts, no assignment of the residue of the term can come within them; (6) that, even if the transfer of the residue of the term does come within the Mortmain Acts, so that the term vested in Her

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[1] [1955] 1 Q.B. 1; [1954] 2 All E.R. 673.

Majesty, the Crown, not having entered into possession, is not liable under the covenants in the lease; (7) that, if all the Crown's other arguments fail, registration of the title gives a good title which defeats automatic forfeiture until the register is rectified; *Morelle Ltd.* v. *Wakeling*[2] was wrongly decided.

Morelle Ltd. v. *Waterworth*[3] was based on two grounds: (1) that the assignment of the residue of a term comes within the Mortmain Acts, and (2) on the particular interpretation given by the court to the word "forfeited," which ordinarily is capable of two meanings, in section 1 (1) of the Mortmain and Charitable Uses Act, 1888.

There is a presumption that the legislature does not intend to make any substantial alteration in the law beyond what it explicitly declares: Maxwell on Interpretation of Statutes, 10th ed., p. 81, and *Murugiah* v. *Jainudeen*.[4] The Act of 1888 was a consolidating Act and was not intended to make any major or radical alterations in the law. If a word is capable of two meanings, that meaning should be ascribed to it which does not effect a radical alteration in the law Accordingly, the Mortmain and Charitable Uses Acts, 1888 and 1891, should be construed as far as possible in conformity with the pre-existing law relating to mortmain. That pre-existing law related exclusively to feudal tenures and had no application to leaseholds, save possibly to exceptionally long terms or terms the granting of which amounted in substance to grants of land in fee or to colourable evasions of the law relating to mortmain. See the Magna Carta of Henry III (9 Hen. 3, c. 36); Pollock and Maitland's History of English Law, 2nd ed., vol. I, p. 333, n. 6, and the Statute De Viris Religiosis of 1279 (7 Edw. 1, stat. 2, c. 1). Under this last Act there is no automatic forfeiture to the Crown on alienation taking place. Forfeiture depended on entry by the Crown or a mesne lord. If no one chose to exercise the right of forfeiture, the transaction would stand. Leases only come in if they are colourable transactions amounting to an alienation of the fee, and so, once a bona fide lease is granted, it is outside the Mortmain Acts and no subsequent disposition can bring it within them. This pre-existing law never applied to an assignment of a short unexpired residue of a term of years. The penalty for infringing the provisions of the law was not automatic forfeiture but liability to forfeiture, and the subject-matter of the forfeiture was the fee simple of the land. The right of the Crown to forfeiture under that pre-existing law was subject to the prior rights in gradation of the mesne lords. See also the statute 15 Ric. 2, c. 5. Contrast the Charitable Uses Act, 1736, which by section 3 made certain gifts to charities null and void.

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[2] [1955] 2 Q.B. 379; [1955] 1 All E.R. 708.

[3] [1955] 1 Q.B. 1.

[4] [1955] A.C. 145, 151.

The Act of 1888 bears a close similarity to the Statute De Viris Religiosis. In section 1 (1) the words " and Her Majesty " may enter on and hold the land accordingly " indicate the giving of an option to enter or not. If the forfeiture were automatic, those words would be mere surplusage. It is not suggested by the Act that alienation operates as a forfeiture. The words " shall be " forfeited " denote only liability to forfeiture. In the Statute De Viris Religiosis the words " under pain of forfeiture " indicated only liability to forfeiture. The effect of the decision of the Court of Appeal is to hold that the Act of 1888 produced a radical change from liability to forfeiture to actual forfeiture. If there were an automatic forfeiture to the Crown under section 1 (1), the words " instead of to Her Majesty " in section 1 (2) (iv) are inappropriate. It is inconceivable that the effects of alienation contemplated by the legislature should have been different in relation to mesne landlords and the Crown. Even though " for-" feited " there indicates absolute forfeiture, it is dealing with the case where the right of entry has been exercised. See also section 2 of the Act and the definition of " assurance " in section 10 (i), which indicates that there has been here no " assurance " in mortmain. In section 1 " in mortmain " qualifies " assur-" ance." See also the definition of " land " in section 10 (iii), replaced by the definition in section 3 of the Act of 1891. This does not include leaseholds and, even if it did, an assurance of a short unexpired residue of a leasehold term cannot be an assurance of land in mortmain within section 1 of the Act of 1888. No reason has been suggested for the supposed radical change in the law held by *Morelle Ltd.* v. *Waterworth*[5] to have been brought about, and it was not in fact intended. That " forfeit " and " forfeiture " are capable of two distinct meanings—(1) liability to forfeiture and (2) confiscation—appears from *In re Levy's Trusts.*[6] See also sections 177, 179, 180, 183 and 202 of the Customs Duties Consolidation Act, 1876, and sections 68 seq., 75, 77 and 78 of the Customs and Excise Act, 1952. When the latter Act was passed the possible ambiguity of the word " forfeiture " must have been appreciated and the expression " liable to forfeiture " was used: see also the Report of the Committee on the Draft Customs and Excise Bill (Parliamentary

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[5] [1955] 1 Q.B. 1.

[6] (1885) 30 Ch.D. 119, 124–125.

Papers, 1951–1952, Cmd. 8453). See, further, *Morelle Ltd.* v. *Wakeling.*[7]

As to the law before 1888, see Tudor on Charities, 5th ed., pp. 414, 415, 416; Shelford's Law of Mortmain, pp. 1, 4–5, 8, 9, 10, 34–35; Robertson's Civil Proceedings By and Against the Crown, pp. 420, 421, 424, 430; Chitty's Prerogatives of the Crown, pp. 246–247, 247, 248, 249–250, and Bourchier-Chilcott's Law of Mortmain, pp. 17, 19, 29. None of the textbooks attaches importance to the Queen's Remembrancer Act, 1859. Section 25 of that Act did not do away with the necessity for the Crown's title to land forfeitable by reason of unlicensed assurance in mortmain being found by office or an inquisition found, before the Crown can properly enter into possession. See also Co.Litt., 2b; Viner's Abridgement, vol. XV, p. 485, paras. 20, 21, 22; Staunforde on the King's Prerogative, pp. 53 seq., 56; *Rowles* v. *Mason*[8]; *Hemming* v. *Brabason*[9] and *Cotton's Case.*[10]

From the authorities it may be deduced that: (1) Land was not confiscated by alienation in mortmain but was liable to be confiscated. (2) It was only liable to be confiscated if there was an alienation in mortmain within the Statute De Viris Religiosis. (3) It is doubtful whether a lease of 99 years is to be regarded as merely colourable so as to come within the mortmain prohibition. (4) Whatever might be the position as to 99 years' leases, short leases cannot constitute leases in mortmain. (5) There is no authority in the textbooks or the cases for the proposition that the assignment of the residue of a lease which was not itself an alienation in mortmain can be such an alienation. (6) If there was an alienation in mortmain it was necessary, before the Crown could enter, to have an inquisition or office found. The Queen's Remembrancer Act, 1859, did not affect the position, which was still unchanged in 1888. (7) It was alienation which gave rise to the forfeiture, and the forfeiture, when effected, was forfeiture of the land itself. (8) The Crown, on exercising its right of entry, did not just acquire the interest of the corporation and hold that interest of another person; it secured the fee simple.

The Act of 1888 made no difference to the law save accidentally in the matter of the definition of "land" in section 10 (iii), which was corrected by section 3 of the Act of 1891. After the Act of 1888 the Crown still had to enter in order to effect a forfeiture, which then dated back to the date of the assurance.

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[7] [1955] 2 Q.B. 379, 396, 399.

[8] (1612) 2 Brownl. & Golds. 192, 197.

[9] (1660) 1 Bridg.O. 1, 7.

[10] (1612) Godb. 191, 192.

The Court of Appeal was wrong in holding that the forfeiture was automatic and that the title vested in the Crown without inquisition or office found and before entry by the Crown. It was also wrong in holding that it was not the land but the interest of the corporation which was forfeited. It was wrong in holding that an assignment of a lease, which only had a few years to run and which was not itself an assurance in mortmain, was an assurance in mortmain. If the Court of Appeal were right it would mean that, instead of the Crown deriving benefit from exercising its right of forfeiture, it would become saddled with a very onerous burden, and a tenant wishing to avoid a liability for dilapidations would only have to assign the residue of his term to an Irish company. That would be a radical alteration of the law as previously understood.

Truro Corporation v. *Rowe* [11] indicates that an assurance of a short term to a corporation is not an assurance in mortmain. As to the meaning of forfeiture, see *Quesnel Forks Gold Mining Co. Ltd.* v. *Ward.*[12] As to the alteration of previous law by an Act of Parliament, see Maxwell on Interpretation of Statutes, 10th ed., pp. 81–82, *In re Budgett* [13] and *Aristoc Ltd.* v. *Rysta Ltd.*[14]

The Act of 1888 did not make radical changes in the law and place the Crown under onerous liabilities.

A. G. N. Cross following. From the Statute Quia Emptores (18 Edw. 1, c. 1) in 1290 subinfeudation was forbidden. It was against a feudal background that the Statute De Viris Religiosis was passed in 1279, and a comparison with the Act of 1888 illustrates English conservatism. If in 1888 the legislature had meant to change the law it would have eliminated the feudal aspect, but the provisions as to mesne lands were retained though by then mesne lordship was a thing of the past. The Act of 1279 was not intended to cover a lease which in its inception was a good lease but was afterwards assigned to a religious corporation. As to the position of leases in mortmain, *Cotton's Case* [15] is a case of wardship. The only leases which come within the mortmain prohibition are colourable leases which can be treated as alienations of the fee simple. That was the position before the Act of 1888 and there is no reason to think that that Act changed it. Section 1 merely reproduces the feudal provisions of the Act of 1279, and "land" there means the freehold of the land. To come within the section a lease must be a lease in mortmain calculated to deprive the lord of his escheats. If there is a perfectly good lease in the first place, not an assurance in mortmain, an assignment of it to a corporation is not an assurance in mortmain. Having regard to the amendment of the definition of "land" by the Act of 1891, this assignment cannot come within it. The assignment of the leasehold interest cannot be covered by section 1 of the Act of 1888 because it would lead to the absurd position of the forfeiture of the fee simple. The term could not be held of a mesne lord, for a mesne lord is a feudal lord and not the landlord under a lease. In any event, the term "land" cannot include a leasehold interest in land. The definition of "land" in section 10 (iii) of the Act of 1888 corresponds to the Charitable Uses Act, 1736, but it was altered because it was seen to be too wide: see *Attorney-General* v. *Graves*,[16] where the words "any estate or interest" were relied on by Lord Hardwicke L.C. to bring in leaseholds, but similar words, though included in the definition in the Act of 1888, are omitted in that of 1891.

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[11] [1901] 2 K.B. 870; 17 T.L.R. 773; (C.A.) [1902] 2 K.B. 709; 18 T.L.R. 820.

[12] [1920] A.C. 222, 225–226, 226–227.

[13] [1894] 2 Ch. 557, 559, 561.

[14] [1945] A.C. 68, 92, 96–97; 61 T.L.R. 121; [1945] 1 All E.R. 34.

[15] Godb. 191.

In the present case the predecessors of the charity granted a perfectly proper lease and so the assignment of the residue is not within the mortmain prohibition.

Assuming that this case is one of mortmain, the Crown had a right to forfeit but was not obliged to do so. The old law was not altered to force the land on the Crown. There are overwhelming reasons for construing the relevant section in consonance with the old law. If it had been intended to alter the law by the Act of 1888 the feudal structure would not have been retained. It would be strange if Parliament had gone against the general principle of English law that persons are not to have onerous burdens thrust upon them: see the arguments submitted for the Attorney-General in this case in the Court of Appeal.[17] In *Morelle Ltd.* v. *Waterworth* [18] the court did not take sufficiently into account the feudal aspect of the matter. Section 25 of the Queen's Remembrancer Act, 1859, did not alter the position with regard to forfeiture in the case of mortmain: see Robertson on Civil Proceedings By and Against the Crown, p. 423.

S. Pascoe Hayward Q.C. and *F. E. Skone James* for the respondent trustees. In this case there are two questions: (1) Was the transfer an assurance of land in mortmain? (2) If

[16] (1752) Amb. 155.

[17] [1955] Ch. 664, 669.

[18] [1955] 1 Q.B. 1, 12–13.

so, what was its effect? The answers to both depend on the true construction of the Act of 1888. In dealing with a consolidating Act it is not necessary to find the meaning of the old Act: Maxwell on the Interpretation of Statutes, 10th ed., p. 25. If one finds significant changes in the language or context of the new Act, it may be held that the law has been changed. Since the Statute De Viris Religiosis was passed the whole legal, economic and social structure of the country has changed. In an amending Act, even if it is also a consolidating Act, one must not be surprised at finding changes in the law.

To answer the first question one must also inquire: (1) Was this an assurance? (2) Was it an assurance of land? (3) Was it an assurance of land in mortmain?

It was an assurance, for " assurance " is given a definition in the widest possible terms in section 10 (i) of the Act of 1888. An assurance includes a transfer. Further, it was an assurance of land within the definition in section 3 of the Act of 1891: see Tudor on Charities, 5th ed., p. 434; Halsbury's Laws of England, 2nd ed., vol. XXVII, p. 584, para. 1049, and *In re Kershaw*.[19] " Tenure " includes leaseholds, and these were not cut out by the Act of 1891, which altered the definition because it was realized that the terms of the definition in the Act of 1888 taken from the Charitable Uses Act, 1736, covered a lot of cases of " impure personalty " or personal estate connected with land and savouring of the realty: see Tudor on Charitable Trusts, 4th ed., pp. 452, 455, 463. The necessity for the change was to remove property of this type. Leaseholds are within the definition of " land " in the Act of 1891, and, accordingly, this was an assurance of land. Finally, it was also an assurance of land in mortmain. In order to be so it does not have to come within the earlier law. The question whether the transfer of a lease would come within the statute of 1279 is difficult and doubtful. By 1888 feudal services were things of the past and one must find the general intention of Parliament elsewhere than there, viz., in the reluctance of Parliament to allow land to become inalienable, as being contrary to the interests of the State. Hence mortmain and charitable uses were linked in one Act. In the use of the word " mortmain " the emphasis is not on the nature of the property held but on the holder: see the Shorter Oxford English Dictionary, vol. I, p. 1284, and Stroud's Judicial Dictionary, 2nd ed., vol. II, p. 1231. Any land held by a corporation without licence from the Crown or by statute is land in mortmain.

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[19] (1888) 37 Ch.D. 674.

It is unlikely that if Parliament had intended to limit the scope of words like " assurance " and " land " it would have used the immensely wide language which it did. The Irish company here was a corporation which had no authority to hold land in mortmain.

On the second question, assuming that the transfer to the company was an assurance of land in mortmain, what was the effect of section 1 of the Act of 1888 on the land? The Court of Appeal were right in holding that plainly on the language of section 1 the term of years vested in the Crown as from the date of the execution of the transfer. There is a difference between the Act of 1888 and that of 1279 in that under the old law the Crown and the mesne lords were on the same footing but the Act of 1888 distinguishes sharply between them. The significant thing about the Act of 1888 is that under it something happens to the land at the date of the transfer. In this Act the passive voice is used for the first time. That is quite unlike the Act of 1279. The change of language is relied on by the respondents as indicating that an automatic transfer to the Crown results, and the forfeiture prescribed by the Act takes effect at once. If later the mesne lord elects to enter, the land ceases to be forfeited to the Crown. On the argument of the Crown a threat would be hanging over the property for an indefinite period. Reliance is also placed on section 1 (2) (iv) of the Act of 1888, where the word " forfeiture " is used in the absolute sense and not merely as implying a right to forfeit, and a different meaning should not be given to it in section 1 (1). See also Blackstone's Commentaries (1766 ed.), vol. II, pp. 267–268, and *The Annandale*,[20] which is a very similar case. The difference between the use of the word " shall " in the relevant enactment in that case and " may " here makes no difference to the forfeiture point. The primary meaning of " forfeiture " is immediate forfeiture.

What is forfeited is the land which is assured, and in the present case that means the leasehold interest in the land. It was the residue of the term of the leasehold interest which was assured and that is what is forfeited. The leasehold interest is " land " within the definition.

As to the alleged necessity for an inquisition or office found, this is foreign to the language chosen by the legislature, which involves an immediate vesting in the Crown: see Chitty on Prerogatives of the Crown, p. 250. After the passing of the Queen's Remembrancer Act, 1859, the necessity for re-entry, inquisition or office found is not to be imported unless the requirements for them are clearly expressed.

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[20] (1877) 2 P.D. 179, 218.

Morelle Ltd. v. *Waterworth*[21] *and Morelle Ltd.* v. *Wakeling*[22] are rightly decided and should be followed.

F. E. Skone James following. There are two aspects of the case, (1) whether under the Act of 1888 forfeiture is automatic, and (2) whether it applies to leaseholds. The two must be kept distinct in considering how far the Act altered the law.

Before 1888 the alienation of a leasehold interest would not have been affected, but the Act of that year brought together mortmain and charitable uses using the same definition of land as in the Act of 1736. Since 1888 an assurance of a leasehold to a corporation (apart from an ordinary trading corporation) is within the mortmain prohibition. What was contemplated was the alienation of land to charities which would tend to hold freeholds or leaseholds without putting them into the common stock of dealing. The change in the definition in the Act of 1891 was intended to clear up confusion. The Crown has relied on the English translation of the Statute De Viris Religiosis, but the original Latin corresponding to the words "under pain of forfeiture" is "sub forisfactura." This expression is explained by Coke (Co.Litt., 59a) as meaning that on the conveyance the land becomes outlaw. Thus there may be a forfeiture without entry.

Geoffrey Cross Q.C. in reply. It is conceded by the respondents that under the old law an assignment of the leasehold interest would not have been an assurance in mortmain, but it is said that the Act of 1888 altered this and also made forfeiture automatic. But in that Act the legislature rewrote the Statute De Viris Religiosis in modern language, even including the dead provisions as to mesne lords. Its intention was merely to rewrite the old Act in modern language. The arguments of the respondents do less than justice to the words "in mortmain" and give no meaning to them. They said that these words in section 1 (1) mean an assurance to a corporation which has not a licence to hold land from the Crown or by statute. In view of the words which follow in section 1 (1), this construction would involve tautology. The forfeiture was not automatic. See Robertson's Civil Proceedings By and Against the Crown, p. 567, as to limitation in the recovery of hereditaments by the Crown. The position there described was unchanged by the Act of 1888. In

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[21] [1955] 1 Q.B. 1.

[22] [1955] 2 Q.B. 379.

The Annandale [23] the Crown was not directing its mind to the question whether if the ship had been a damnosa hereditas the Crown would have been compelled to take it.

[Their Lordships intimated that they wished to hear argument as to the effect of the Land Registration Act, 1925.]

Geoffrey Cross Q.C. As to the question whether the Land Registration Act, 1925, affects the matter, the Court of Appeal in *Morelle Ltd.* v. *Wakeling* [24] relied on section 80. But if an unlicensed corporation registered its title to a freehold estate, then under section 5 an estate in fee simple would be vested in it and the Crown's right to forfeiture would be affected, although that right had previously accrued. The Crown would then only have the right to apply for rectification. The same applies to leaseholds under sections 9 and 10. As to transfers of leasehold land, see sections 21, 22 (1) and 23 (1). The effect of section 23 (1) is to vest the registered estate in the corporation free of the forfeiture. The execution of the transfer by the previous proprietor operated to create a right of forfeiture in the Crown, but the legal estate remained in the transferee until the registration, and the right of forfeiture was subject to the provisions of the Act as to the registration of transfers for valuable consideration. The question is whether the legal estate passed from the transferor to the company on registration or whether, if the forfeiture was automatic, notwithstanding the registration the Crown is proprietor. Section 80 does not apply here because section 23 contains express provisions to the contrary. Section 69 supports the appellant's argument on the general scheme of the Act. As to rectification of the register, see sections 82 (1) and 83. The Crown has the right to apply for rectification but has not got the legal estate.

It would produce an odd result if this disposition did not rank as a disposition at all. Once a person is on the register as a registered owner he can transfer the legal estate; registration is designed by the policy of the Act to make for easy and simple transfer of land, but a right to compensation is provided for an owner who has been defrauded (e.g., by forgery). Here the company, being the registered proprietor, can transfer the legal estate to someone else. Any automatic forfeiture under the Mortmain Acts is subject to the overriding provisions as to first registration and dispositions for value.

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[23] 2 P.D. 179, 218.

[24] [1955] 2 Q.B. 379.

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Assuming that the House was against the appellant both on the construction of the Act of 1888 and on the point as to registration, then the effect of section 1 of the Act of 1888 would be that the assurance took effect as though it had been an assurance to the Crown. But no one can be forced to take a damnosa haereditas against his will. See the arguments for the Crown referred to in the court below.[25] If the Crown has not accepted the estate it is entitled to disclaim it.

S. Pascoe Hayward Q.C. If the argument for the appellant is right, the effect of section 23 of the Act of 1925 is to destroy the Crown's right of forfeiture and the company gets the estate free from that right. But the right view is that which was taken by the Court of Appeal—that the object of the section is to afford protection against defects in the transferor's title: see *Morelle Ltd.* v. *Wakeling.*[26] Either section 80 is entirely overridden or it is not; there can be no half-way house like rectification in this matter. Here the Crown would have no right to rectification: see Land Registration Rules, 1925 (S.R. & O. 1925, No. 1093), r. 123 (1). To decide in favour of the appellant would have an extraordinary effect; it would mean that the Mortmain Acts would no longer apply to registered land. In a case like this the Crown is not entitled to disclaim. The right of disclaimer only applies in the case of a voluntary transfer.

F. E. Skone James following. What one is considering is the language of the Act of 1888, in particular section 1 (1). The forfeiture arises on the assurance, whether one is dealing with registered or unregistered land. In the case of registered land there is not an effective assurance until the entry on the register: see section 22 (1) of the Act of 1925. Here the estate vests in the company on registration and then it is forfeited. The vesting is free from any estate in the Crown. Reliance is placed on the last lines of section 23 (1).

Geoffrey Cross Q.C. in reply. As to the question whether or not the Crown would have a right to rectification, the words "free from all other estates and interests whatsoever" in section 23 (1) of the Act of 1925 is given no meaning by the respondents. These words are not only dealing with the Crown's estates and interests. They just mean that the registered title is free from remaining equitable interests based on fraud. They do not bar the right to rectification. The legal title did not get off the register and vest in the Crown.

[25] [1955] Ch. 664, 676–677.

[26] [1955] 2 Q.B. 379, 411.

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Their Lordships took time for consideration.

December 19. EARL JOWITT. My Lords, this case raises an important issue which depends upon the construction to be placed upon the Mortmain and Charitable Uses Acts, 1888 and 1891. [His Lordship stated the facts and continued:] It was claimed by the respondents that, on the true construction of the Mortmain and Charitable Uses Acts, 1888 and 1891, the transfer of the unexpired residue of the term to Arffe Ltd. for valuable consideration was an assurance of lands in mortmain, and they claimed further that such an assurance brought about an automatic transfer of the unexpired residue of the term whereby the same became vested in Her Majesty. The Attorney-General, on the other hand, contended that even if there had been an assurance of lands in mortmain (which he disputed) Her Majesty would have acquired merely a right to enter upon and take possession of the lands if she desired to do so but was under no obligation if she did not so desire.

The Court of Appeal (Singleton, Denning and Morris L.JJ.) had decided in a previous case in which a leasehold interest had been transferred to an Irish company without licence to hold lands in mortmain that an automatic forfeiture to Her Majesty had resulted (*Morelle Ltd.* v. *Waterworth* [1]). Harman J. and the Court of Appeal decided in the present case, and I think rightly decided, that they ought to follow this previous decision. We have therefore to consider whether the case of *Morelle Ltd.* v. *Waterworth* [1] was rightly decided.

The consequences of the decision in that case are indeed far-reaching. It would follow that any person holding a short unexpired residue of a leasehold interest would merely have to transfer that interest to a company without licence to hold lands in mortmain to bring about the result that the unexpired residue would be vested in Her Majesty so as to make Her Majesty liable under the covenants contained in the lease. Such covenants commonly involve an obligation to repair, and at the end of a long lease such covenants may and generally will involve onerous burdens. It is not improbable, on this view of the law, that many leasehold interests involving onerous burdens will be transferred indirectly to Her Majesty by the simple expedient of transferring such interests directly to a company without licence to hold lands in mortmain.

[1] [1955] 1 Q.B. 1; [1954] 2 All E.R. 673.

Before considering the construction to be placed upon the Mortmain and Charitable Uses Acts, 1888 and 1891, the law as it existed before the passing of these Acts should be stated.

Under the Statute De Viris Religiosis (7 Edw. 1, stat. 2, c. 1) it was provided: " That no person, religious or other, whatsoever " he be, that will buy or sell any lands or tenements, or under " the colour of gift or lease, or that will receive by reason of any " other title, whatsoever it be, lands or tenements, or by any " other craft or engine will presume to appropre to himself, under " pain of forfeiture of the same, whereby such lands or tenements " may any wise come into mortmain. We have provided also, " that if any person, religious or other, do presume either by " craft or engine to offend against this statute, it shall be lawful " to us and other chief lords of the fee immediate, to enter into " the land so aliened, within a year from the time of the alienation, and to hold it in fee as an inheritance." That statute contained provisions preserving the rights of the chief lords or the next chief lord or lords immediate, as the case might be, to enter upon the land; and in the event of all the lords neglecting to exercise their right, the statute provided that after the expiration of one year from the act creating the forfeiture, " we . . . " shall take such lands and tenements into our hand, and shall " infeoff other therein by certain services to be done to us for " the defence of our realm."

No doubt the explanation of the passing of this statute was to protect the rights of the lords, for, as Coke C.J. said, " the lands " were said to come to dead hands as to the lords, for that by " alienation in mortmaine they lost wholly their escheats, and in " effect their knights-services for the defence of the realm, wards, " marriages, reliefs, and the like; and therefore was called a dead " hand, for that a dead hand yieldeth no service " (Co.Litt., 2b).

It should be noticed that the Statute De Viris Religiosis did not extend to leaseholds unless the lease either by the length of term granted or by reason of its other incidents could be regarded as an alienation of the fee. The words of the Statute De Viris Religiosis are " under the colour of gift or lease." It appears that it was considered that a term for 20 or 40 or even 99 years was not within the statute but that a lease for 100 or 200 years was within the statute.

It is to be noticed further that there was no automatic forfeiture—indeed, unless the lord entered within one year after the alienation giving rise to the forfeiture, he lost his right to enter. The King could not enter upon lands alienated in mortmain save after office found or inquisition—and it was, of course, open to the King to decide whether or not this machinery should be put in motion.

Other statutes were subsequently passed to prevent ingenious attempts to evade the prohibition of alienation which had been enacted by the Statute De Viris Religiosis; and to make it plain that the prohibition of alienation applied to corporations lay as well as to corporations ecclesiastical.

So the law remained in all essentials for many centuries, and the problem which arises in the present case depends upon whether the Acts of 1888 and 1891 must be construed as having made such a fundamental and far-reaching alteration in the structure of the pre-existing law as to involve the consequence that an alienation in mortmain which had previously given the mesne lords or the King a right to enter upon the lands if they so desired was henceforth to involve an automatic transfer of the lands to Her Majesty whether she entered into possession or not.

By the year 1888 feudal tenure had, for all practical purposes, come to an end, and I find it difficult to imagine any reason which could have induced the legislature in that year to make any such sweeping alteration in the pre-existing law. It is necessary to examine carefully the language of the Act, which is entitled " An Act to consolidate and amend the law relating to " Mortmain and to the disposition of land for charitable uses," to see whether such an alteration was made.

The definition of " land " which was originally contained in section 10 (iii) of the Act of 1888 was replaced by an amended definition contained in section 3 of the Act of 1891. Section 1 of the Act of 1888 is in the following terms: " (1) Land shall not be assured to or for the benefit " of, or acquired by or on behalf of, any corporation in mort- " main, otherwise than under the authority of a licence from " Her Majesty the Queen, or of a statute for the time being in " force, and if any land is so assured otherwise than as aforesaid " the land shall be forfeited to Her Majesty from the date of the " assurance, and Her Majesty may enter on and hold the land " accordingly: (2) Provided as follows:—(i) if the land is held " directly of a mesne lord under Her Majesty, that mesne lord " may enter on and hold the land at any time within twelve " months from the date of the assurance: (ii) if the land is held " of more than one mesne lord in gradation under Her Majesty, " the superior of those mesne lords may enter on and hold the "land at any time within six months after the time at which the "right of the inferior lord to enter on the land expires: (iii) if a "mesne lord is at the time when his right of entry accrues under "this Act a lunatic or otherwise under incapacity, his right of "entry may be exercised by his guardian or the committee of "his estate, or by such person as Her Majesty's High Court of "Justice may appoint in that behalf: (iv) if the right of entry "under this Act is exercised by or on behalf of a mesne lord, the "land shall be forfeited to that lord from the date of the "assurance instead of to Her Majesty." By the definition in section 10 (i), "assurance" includes a lease or transfer, and by the amended definition "land" includes "tenements or hereditaments of any tenure."

I will assume, without expressing any final opinion on the point, that the transfer to Arffe Ltd. in 1953 of the residue of the term, then consisting of some four and a half years, constituted an "assurance of lands in mortmain." Such a transfer on this assumption was therefore within the prohibition of the statute. It then becomes necessary to consider whether such prohibited transfer had the effect of automatically vesting the residue of the term in Her Majesty, or whether it merely gave Her Majesty a right, if she should be so minded, to enter on and hold the land.

The critical words of the statute are "the land shall be "forfeited to Her Majesty from the date of the assurance, and "Her Majesty may enter on and hold the land accordingly." It is, I think, clear that the extent and consequences of the word "forfeited" may be controlled by the context in which the word is used. In the days before the passing of the Act of 1888, at a time when there was no suggestion of an automatic forfeiture, it would surely have been appropriate to use the word "forfeited" in relation to lands which had become liable to forfeiture by reason of an alienation in mortmain. The lands, it might have been said, were "forfeit" or "forfeited." In such a case it might happen that the mesne lord or the King would exact the penalty and would enter on and take possession of the land which had been so alienated, and if such an event happened it would have been appropriate to refer to the land as having been "forfeited." It might happen, on the other hand, that the mesne lord or the King would not exact the penalty—and in such a case it would have been a correct use of language to say "the land was forfeited but advantage was not taken of the forfeiture." In either case the land could have been described accurately as having been "forfeited," but the consequence of the forfeiture would depend upon whether the mesne lord or the King decided to enter upon the land. To this extent, and to this extent only, is there an ambiguity about the word "forfeited."

It follows, in my view, that no inference can be drawn from the use of the word "forfeited" in this section; for the consequences of a prohibited alienation depend not only upon the forfeiture but also upon the question whether there had been a subsequent entry upon the land. Nor can I think that the words "from the date of the assurance" help to resolve any ambiguity that may exist—for these words may mean merely that if Her Majesty takes advantage of the forfeiture by entry on the lands her title is to date back to the date of the assurance. The words are plainly used in this sense in the fourth proviso when the Act is dealing with the rights of the mesne lords.

On the other hand, the words "Her Majesty may enter on "and hold the land accordingly" point, in my view, to the conclusion that Her Majesty was being given an option to enter or not as she might think fit, and are hardly consistent with the idea of an automatic forfeiture. I find it difficult to give any effective meaning to the words "may enter" if the forfeiture is to be automatic. I am strengthened in this view by the consideration of the law existing before the Act of 1888: for under that law the King had a right to enter on and hold land which had incurred a forfeiture but was under no obligation to enter—and this notwithstanding the words of the statute, "we *shall* "take such lands and tenements into our hand." It would indeed be a strange result if we were to hold that under the Mortmain Act of 1888 Her Majesty was bound to take over the land when the corresponding words are "Her Majesty *may* enter "on and hold the land accordingly."

It must be remembered that the Act of 1888 was entitled "An Act to consolidate and amend." Bearing in mind, therefore, that the Act must at least in part be construed as a consolidating Act, it is material to see the extent of the alterations in the pre-existing law for which the respondents contend. First, they contend that the Act of 1888 applied to leaseholds, however short the term might be. I have assumed this contention to be correct: it was far otherwise with the pre-existing law. Secondly, they contend that the forfeiture resulting from a prohibited alienation might be merely a forfeiture of the leasehold interest. It cannot, I think, be doubted that under the pre-existing law the forfeiture—if forfeiture there was—extended to nothing less than the fee itself. I think an acceptance of this second contention logically follows from an acceptance of the first contention. Thirdly, they contend that the forfeiture to Her Majesty is an "automatic forfeiture," in no way depending upon her volition.

The first two contentions are indeed far-reaching and constitute important "amendments" to the pre-existing law; but if, in addition to these two contentions, the third contention also is to be accepted, it would seem that the pre-existing law has been virtually swept away. At the most a few fragments—and relatively unimportant fragments—of the pre-existing law would remain. If this had been intended, I cannot think that the Act of 1888 would have been entitled "An Act to consolidate "and amend."

Reliance was placed by the respondents upon the words of proviso (iv) in subsection (2) of section 1 of the Act of 1888, which is in the following terms: "if the right of "entry under this Act is exercised by or on behalf of a mesne "lord, the land shall be forfeited to that lord from the date "of the assurance instead of to Her Majesty." It was argued that in that proviso the word "forfeited" is used in the sense of an absolute forfeiture and not as meaning a mere right to forfeit. I think this is so. But that proviso is dealing with the case where a mesne lord has entered and the legal penalties resulting from the forfeiture have been exacted. It does not make it impossible to give a more limited meaning to the words in those cases in which there has been no entry. The provisos make it plain that the mesne lord was being given a right to enter or not to enter as he thought fit if a prohibited assurance were made. I cannot think that it was intended to differentiate between the position of the mesne lords and the position of Her Majesty in this respect.

Finally, my Lords, in construing the Act of 1888 we should bear in mind the provisions of the Land Registration Act, 1925. It would be unfortunate if we were driven to adopt a construction of the Act of 1888 which would lead to one result if the leasehold title to the land in question had been registered under the scheme laid down by the Act of 1925, and would lead to another and to a different result if it had not been so registered. By section 80 of the Act of 1925 it was provided as follows: "Subject "to the express provisions of this Act relating to . . . the "effect of registration of a disposition for valuable consideration, "nothing in this Act affects any right of His Majesty to any ". . . forfeiture." Incidentally, I would point out that the phrase "the right of His Majesty to any forfeiture" seems quite inapt if the fact be that Her Majesty has no right to decide on her course of action but has a duty to take whatever may be cast into her lap.

The express provisions relevant to this point are to be found in section 23 (1) and (2) of the Act of 1925 and are in the following terms: "(1) In the case of a leasehold estate registered with an absolute title, a disposition . . . for valuable "consideration shall, when registered, be deemed to vest in the "transferee . . . the estate transferred . . . to the extent of "the registered estate" subject as therein mentioned "but free "from all other estates and interests whatsoever, including "estates and interests of His Majesty; and the transfer . . . "shall operate in like manner as if the registered transferor ". . . were (subject to any entry to the contrary on the register) "absolutely entitled to the registered lease for his own benefit." Similar provisions with differences not now material apply to the registration of a good leasehold title as they apply to registration with an absolute title (subsection (2)).

The Court of Appeal considered the effect of these provisions in *Morelle Ltd.* v. *Wakeling*,[2] and came to the conclusion that the express provisions contained in section 23 did not affect Her Majesty's right of forfeiture. My Lords, with the very greatest respect to the opinion of the Court of Appeal, I confess that I should have felt great difficulty in reaching this conclusion. There can be no doubt that the provisions contained in section 23 are express provisions relating to a disposition for valuable consideration, and I should have been inclined to construe them as affecting the right of Her Majesty to forfeiture in such a case as the present. It may well be that Her Majesty has the right to apply to have the register rectified, but the fact that such a step might be a necessary preliminary to enforcing a forfeiture would in itself affect her rights. Fortunately it is not necessary in the view which I take to express any final opinion on this point, and I prefer not to do so.

In the result, holding as I do that there was no automatic forfeiture, I would allow this appeal. I would answer the question 1 (*a*) posed in the originating summons in the affirmative. The other questions do not arise.

LORD PORTER. My Lords, a number of difficult and abstruse questions have been presented to your Lordships' House for the

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[2] [1955] 2 Q.B. 379; [1955] 1 All E.R. 708.

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solution of this case, but as I have formed a view with regard to one only, and that view is decisive of the case, I do not intend to express any opinion upon the other matters.

The decision which I have reached depends and depends only upon the construction to be placed upon section 1 of the Mortmain and Charitable Uses Act, 1888. That section has been set out in the opinions expressed by my noble and learned friend upon the Woolsack, and I need not repeat it; it must, I think, be read as a whole, and it is, in my opinion, important to observe that in each of the subsections the same phrase is used, viz., "may enter and hold," i.e., "Her Majesty may enter and "hold": "that mesne lord may enter and hold": "the "superior of those lords may enter and hold." Admittedly in the two latter cases the land passed to the mesne lord, not automatically but of his choice, and I find it difficult to think that identical language should be used of the Crown and of the mesne lords unless it was intended to produce the same result.

My opinion is strengthened by two considerations: (1) I should think it unlikely that a burden should be placed upon the Crown against its will by so ambiguous language, and (2) under subsection (2) (iv) the land is to be forfeited to the mesne lord "instead of to Her Majesty."

If the land automatically passed to Her Majesty by an assurance in mortmain, it would pass not to the mesne lord instead of to Her Majesty but from Her Majesty to the mesne lord, however infinitesimal the time during which Her Majesty's tenure might last. If, on the other hand, the person assuring the land in mortmain continues to remain in possession until Her Majesty or some mesne lord exercises an option to enter and hold, no difficulty arises. If, however, the land passes automatically to the Crown, then until the mesne lord exercises his option it is the Crown's property and not that of the assurer in mortmain. I heard no solution of this difficulty on the part of the respondents and accordingly the subsection, in my opinion, supports the view that the forfeiting is not automatic.

That the forfeiture relates back to the date of the assurance does not, as I think, affect this construction. In the case of the Crown, as in that of the mesne lord, once an option to forfeit is exercised, the land is, in my opinion, held by the Crown or the mesne lord as the case may be from the date of the assurance.

I am unable to accept the suggestion that the land, having been forfeited to Her Majesty, ceases to be so forfeited because at a later stage the mesne lord elects to enter and hold the

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property. The strength of the opposite opinion rests upon the fact that " forfeiture " in section 1 (1) must, on the construction which I have adopted, mean " liable to forfeiture," whereas, as my noble and learned friend Lord Morton of Henryton points out in his opinion, which I have had an opportunity of reading, it bears the meaning of " forfeited " and not " liable to " forfeiture " in subsection (2) (iv). This is true, but the collocation is different. Admittedly the word " forfeited " may bear the meaning " liable to forfeiture " at the will of the person to whom the right of forfeiture is given and does not in every case imply automatic forfeiture.

In my opinion, the former is the more usual meaning, unless there is something in the surrounding expressions which necessitates a contrary implication. In subsection (2) (i) and (ii) the word necessarily bears the meaning that the land passes to the mesne lord on his exercising his election to take it and then becomes his from the date of the assurance in mortmain. But in subsection (1), where no right of choice is expressly given, there is no necessity for construing it as passing the property contrary to the will of the recipient. Indeed, the provision that the land should pass to the mesne lord as from the date of the assurance, in, as I have said, my view, is contrary to such an assumption.

I would allow the appeal.

LORD MORTON OF HENRYTON. My Lords, this appeal raises interesting questions as to the construction and effect of the Mortmain and Charitable Uses Acts, 1888 and 1891. The events leading up to the litigation are as follows. [His Lordship stated the facts and continued:] It is convenient at this point to set out the relevant provisions of the Acts of 1888 and 1891. The Act of 1888 is entitled " An Act to consolidate and " amend the law relating to mortmain and to the disposition " of land for charitable uses," so that it is not merely a consolidating Act. Section 1 of the Act is as follows: " (1) Land shall not be assured to or for the benefit of, or " acquired by or on behalf of, any corporation in mortmain, " otherwise than under the authority of a licence from Her " Majesty the Queen, or of a statute for the time being in force, " and if any land is so assured otherwise than as aforesaid the " land shall be forfeited to Her Majesty from the date of the " assurance, and Her Majesty may enter on and hold the land " accordingly: (2) Provided as follows: (i) if the land is held " directly of a mesne lord under Her Majesty, that mesne lord "may enter on and hold the land at any time within twelve "months from the date of the assurance: (ii) if the land is held "of more than one mesne lord in gradation under Her Majesty, "the superior of those mesne lords may enter on and hold the "land at any time within six months after the time at which "the right of the inferior lord to enter on the land expires; (iii) "if a mesne lord is at the time when his right of entry accrues "under this Act a lunatic or otherwise under incapacity, his "right of entry may be exercised by his guardian or the committee of his estate, or by such person as Her Majesty's High "Court of Justice may appoint in that behalf: (iv) if the right "of entry under this Act is exercised by or on behalf of a mesne "lord, the land shall be forfeited to that lord from the date "of the assurance instead of to Her Majesty." Section 10 provides: "In this Act, unless the context otherwise requires,— "(i) 'Assurance' includes a gift, conveyance, appointment, "lease, transfer, settlement, mortgage, charge, incumbrance, "devise, bequest, and every other assurance by deed, will, or "other instrument; and 'assure' and 'assuror' have meanings "corresponding with assurance . . . (iii) 'Land' includes tenements and hereditaments corporeal and incorporeal of whatsoever tenure, and any estate and interest in land." Section 3 of the amending Act of 1891 altered the last-mentioned definition by providing that: "'Land' in the Mortmain and Charitable "Uses Act, 1888, and in this Act, shall include tenements and "hereditaments, corporeal or incorporeal, of any tenure, but not "money secured on land or other personal estate arising from or "connected with land . . ."

The first question arising for decision is whether the transfer to Arffe Ltd. in 1953 was an assurance of land in mortmain, within the meaning of section 1 of the Act of 1888. If that question is answered in the affirmative, the further question arises whether the words "shall be forfeited to Her "Majesty from the date of the assurance" denote immediate forfeiture or merely a liability to forfeiture. If these words are held to have the former meaning, a third question will arise, viz., whether the effect of the Acts of 1888 and 1891 in the case of registered land is different from their effect in the case of unregistered land. The fifteen trustees contended that the first question just stated should be answered in the affirmative; that the land became vested in the Crown from the date of the assurance to Arffe Ltd., and that registered land is, in this respect,

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upon the same footing as unregistered land. The Crown contended to the contrary. The Official Trustee and Arffe Ltd. did not desire to take part in the arguments in your Lordships' House and were willing to submit to any order, but Arffe Ltd. desired to identify itself with the arguments presented on behalf of the Crown. The three questions just stated have been decided in favour of the trustees by the Court of Appeal. In so deciding that court followed decisions of its own in the cases of *Morelle Ltd.* v. *Waterworth* [3] and *Morelle Ltd.* v. *Wakeling.*[4]

I now turn to the question whether the transfer to Arffe Ltd. in 1953 was or was not an assurance of land in mortmain within the meaning of section 1 of the Act of 1888. I think this question can be conveniently divided into three parts: first, was the transfer an assurance?; secondly, if so, was it an assurance in mortmain?; thirdly, if so, was it an assurance of " land " in mortmain?

My Lords, to my mind the first of these questions is answered clearly by the definition of " assurance " in section 10 of the Act of 1888. That section defines " assurance " in terms which could hardly be wider, and the definition expressly includes " a " lease, transfer . . . and every other assurance by deed, will, or " other instrument." The word " transfer " is an exact description of the document whereby the residue of the lease was transferred to Arffe Ltd. The definition is qualified by the words " unless the context otherwise requires," but I can find no such context in section 1 of the Act. It is true that the provisos in subsection (2) are only applicable to a case in which the land assured is of freehold tenure, but that is not a context which requires a narrower meaning to be given to subsection (1).

Next, is the transfer an assurance in mortmain? Again, it seems to me that it exactly answers that description. It is an assurance, and it cannot, I think, be doubted that as a result of the assurance the land comprised therein was in mortmain. I do not read the words " in mortmain " as importing any quality into the assurance itself. They look to the result which is achieved by the transfer. It was suggested in argument, on behalf of the Crown, that the only assurances which were " assurances in mortmain " within the Act of 1888 were assurances which gave rise to forfeiture under the Statutum De Viris Religiosis (7 Edw. 1, stat. 2, c. 1), that is, assurances of freeholds or leases which were merely colourable and amounted in effect to an assurance of the freehold.

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[3] [1955] 1 Q.B. 1.

[4] [1955] 2 Q.B. 379.

My Lords, I do not find it necessary to consider what assurances were within the scope of the statute of Edward I. There is much learning upon the subject, and the view appears to have been held that a lease for 99 years was not within the mischief of the statute but a lease for 100 years might be. To my mind, the suggestion put forward by the Attorney-General cannot stand in face of the all-embracing definition, already quoted, in section 10 of the Act of 1888. That definition draws no distinction between one lease and another, and clearly contemplates that leases, transfers and " every other assurance by deed, will " or other instrument " may be assurances in mortmain, leading to a forfeiture.

Next, is the transfer an assurance of " land "? Here the matter is made clear, to my mind, by the definition, already quoted, in section 3 of the Act of 1891. Under that section " land " in the Acts of 1888 and 1891 " shall include tenements " and hereditaments, corporeal or incorporeal, of any tenure." Leasehold is a tenure (see, for instance, Co.Litt., 93b and *In re Kershaw* [5]) and that which was transferred to Arffe Ltd. was a corporeal tenement of leasehold tenure. It was, therefore, to my mind, exactly within the definition. I would add that as a lease and a transfer are assurances within section 1 of the Act of 1888, it is difficult to believe that the section did not apply to land held under a lease.

I must next deal with the question whether the words " shall " be forfeited to Her Majesty from the date of the assurance " do or do not bring about an immediate forfeiture.

In my opinion these words are unambiguous; indeed, if the legislature desired to enact that an assurance which came within the section was to bring about an immediate forfeiture, I find it difficult to imagine words more apt for the purpose. Do not the words " from the date of the assurance " indicate an immediate forfeiture just as clearly as would the word " immediately "? The contention on behalf of the Crown really involves reading the words in question as meaning " shall be " liable to forfeiture by Her Majesty, and if Her Majesty puts " the forfeiture into effect it shall date back to the date of the " assurance." My Lords, I cannot bring myself to put that meaning upon these simple words. I think, also, that the passive tense " shall be forfeited " signifies that something *happens* to the land from the date of the assurance, without any action on the part of any person. Further, the meaning which

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[5] (1888) 37 Ch.D. 674, 677.

I put upon the words in question is supported by the words which immediately follow: "and Her Majesty may enter on and hold "the land accordingly." To my mind these words are referring to a time after the forfeiture has taken place and Her Majesty may "accordingly," i.e., by reason of that fact, enter on and hold the land.

It was suggested in argument that these words were mere surplusage. I do not agree. I think it likely that the words were intended to emphasise the fact that Her Majesty may enter on the land notwithstanding that the mesne lords are also given rights of entry which may be exercised.

Finally—a point to which I attach great importance—we find in subsection (2) (iv) the words "if the right of entry under this "Act is exercised by or on behalf of a mesne lord, the land shall "be forfeited to that lord from the date of the assurance instead "of to Her Majesty." It is to be observed that in this subsection, as well as in subsection (1), we find that in a certain event "the land shall be forfeited." The construction which I favour gives exactly the same meaning to these words in each place where they occur; whereas the Attorney-General conceded that the construction for which he contended gave to the words "shall "be forfeited" in subsection (1) a meaning different from the meaning which they must bear in subsection (2) (iv). He contended, however, that the words "instead of to Her Majesty" in subsection (2) (iv) were inappropriate if the land had already been forfeited automatically to the Crown under subsection (1). My Lords, to my mind this argument loses any force which it might otherwise have possessed, when it is realized that the same situation could arise even if the word "forfeited" in subsection (1) meant "liable to be forfeited"; for Her Majesty might well have elected to exercise her right of forfeiture shortly after the date of the offending assurance, and a mesne lord might later enter upon the land before the period laid down by subsection (2) had expired. Moreover, the words are not, in my view, wholly inappropriate to a case where there has already been a forfeiture to Her Majesty. They simply effect a substitution of the lord for Her Majesty, as from the date of the assurance, if and when he chooses to enter upon the land. I should perhaps add, in view of an argument advanced by the Attorney-General, that in my view the "land" which is forfeited in the present case is the leasehold land comprised in the transfer to Arffe Ltd. and not the freehold. It is unnecessary to pursue this point, as the Attorney-General's argument that the forfeiture, if any, would be a forfeiture of the freehold did not, I think, commend itself to any of your Lordships.

I now come to a question which is, I think, one of great doubt and difficulty. Even if section 1 of the Act of 1888 provides for an immediate forfeiture, as I think it does, can this provision take effect in the case of registered land, having regard to the terms of the Land Registration Act, 1925, and, in particular, section 80 and sections 20 to 24 inclusive of that Act. This question was considered by the Court of Appeal in *Morelle Ltd.* v. *Wakeling*.[6] The portion of section 80 which is relevant for the present purpose is as follows: "Subject to the express "provisions of this Act relating to . . . the effect of registration "of a disposition for valuable consideration, nothing in this Act "affects any right of His Majesty to any . . . forfeiture."

In the course of the argument I have felt considerable doubt whether the express provisions of section 23 (1) and (2) of the Act of 1925 did or did not negative any forfeiture to the Crown of land registered with good leasehold title, in a case where a disposition for value of that land had been registered. In the end, however, I am not prepared to differ from the Court of Appeal's view that a more limited effect must be given to these subsections. I am assisted to this conclusion by the reflection that it is most unlikely that the legislature can have intended the provisions of section 1 of the Mortmain and Charitable Uses Act, 1888, to be defeated in the case of an assurance of registered land, while allowing these provisions still to have effect in the case of an assurance of land the title to which had not been registered.

For these reasons, my Lords, I would answer the questions asked in paragraph 1 of the originating summons by declaring that the land in question is now vested in Her Majesty the Queen for the unexpired residue of the term granted by the lease of 1862.

Harman J. and the Court of Appeal answered the question asked in paragraph 2 of the originating summons in the affirmative. I would give the same answer. In my view, the terms of section 1 of the Act of 1888 make it clear that the forfeiture takes place without any inquisition made or office found, and notwithstanding that neither Her Majesty nor anyone on her behalf has entered into possession of any part of the land. It is true that, as a result, the Crown is saddled with obligations

[6] [1955] 2 Q.B. 379.

which it has never consented to assume, but the words "shall be "forfeited" are, to my mind, imperative, and they apply equally to beneficial and onerous property.

I would dismiss the appeal.

LORD MACDERMOTT. My Lords, on the view I take of it this appeal depends entirely on the true construction of subsection (1) of section 1 of the Mortmain and Charitable Uses Act, 1888. In ascertaining what that construction is an answer must be found to several questions, and of these it will be convenient to begin with that which seeks the meaning of the word "land" as it is used in the following parts of the subsection, namely,—"Land "shall not be assured . . . in mortmain . . . and if any land is so "assured . . . the land shall be forfeited to Her Majesty. . . ."

The submission of the Crown was that throughout this subsection "land" does not include a term of years and that, in consequence, the interest now in question, the unexpired residue of a lease for 99 years, is unaffected by section 1 and therefore remains vested in the defendant company, Arffe Ltd. Historically, this is a plausible contention, for Part I of the Act of 1888 was intended to replace the earlier mortmain Acts commencing with the Statute De Viris Religiosis of 1279, and these, although they might be contravened by a transaction "under the colour" of a lease, were concerned with the alienation and forfeiture of the fee rather than of any leasehold interest. And it is also to be noted in this connexion that subsection (2) of section 1 of the Act of 1888 provides for what may happen, if "the land" is held of one or more mesne lords, in a manner which shows the legislature still minded to preserve for a class, by then reduced almost to extinction, the rights of entry which it had been given in the heyday of feudalism by the Act of 1279. Indeed, subsection (2) seems, on any view of the remainder of the section, to relate to feudal tenure alone and to use the word "land" as signifying nothing less than the fee.

But, notwithstanding these considerations, the submission under examination must, in my opinion, be rejected having regard to the width of the statutory definition of "land" for the purposes of the Act of 1888. Section 10 (iii) of that Act had originally provided that, unless the context otherwise required, "land" should include "tenements and hereditaments corporeal and "incorporeal of whatsoever tenure, and any estate and interest "in land." There can, I think, be no doubt that this definition included leaseholds. But it was repealed by section 3 of the

Mortmain and Charitable Uses Act, 1891, which provided instead that " land " in the Act of 1888 " shall include tenements and " hereditaments, corporeal or incorporeal, of any tenure, but not " money secured on land or other personal estate arising from or " connected with land. . . ." It was said that the excluding words which end this definition sufficed to exclude leaseholds and that these could not therefore come within the expression " tenements and hereditaments . . . of any tenure." In my opinion, the excluding words of this definition do not refer to leaseholds. I think it is clear that their object was to exclude certain kinds of personal property, such as mortgages and charges on land and the proceeds of sale on a trust for conversion, which had come to be spoken of as " impure personalty " but which did not include chattels real. This being so, the expression " tenements and hereditaments . . . of any tenure " in the definition may be interpreted for present purposes without regard to what follows it. Now, it would, I think, have been generally accepted at one time that these words referred to feudal tenures and were not apt to describe a term of years. But that was long before 1891 and I have no doubt that by the middle of the nineteenth century, if not earlier, this expression was commonly used to include leaseholds. In *In re Kershaw*[7] North J. held that the words " any land or other hereditaments of whatever tenure " in 40 & 41 Vict. c. 34 extended to leaseholds, and I think it was in this sense that the words " of any tenure " were used in the definitions of " land " contained in section 4 of Lord Brougham's Act, 1850 (13 & 14 Vict. c. 21), in section 2 of the Conveyancing Act, 1881, and in section 3 of the Interpretation Act, 1889.

I am, therefore, of opinion that the definition of " land " in the Act of 1891 includes land held on lease, and I find confirmation for this view in section 4 of the Act of 1888, which contemplates a valid disposition of land for charitable uses taking the form of a lease, and also in the definition of " assurance " in section 10, which is wide enough to include a lease and the assignment of a lease. But does the context " otherwise require " so as to make this definition of land inapplicable as respects the parts of subsection (1) to which I have referred? For the reason already mentioned, I think it may well be that the word " land " as used in subsection (2) does not embrace leaseholds. Subsection (1), however, furnishes no reason of that sort and I think the question here is really whether the departure from De Viris Religiosis, which adherence to the statutory definition would entail, can justify the exclusion of leaseholds. Had the Act of 1888 purported merely to consolidate the law of mortmain much might be said in favour of such exclusion; but in its short title it is described as "An Act to consolidate and amend the "law relating to mortmain," and that being one of its avowed purposes I can see no sound ground for holding that the leasehold implications of the definition should stop short of subsection (1). It would, indeed, be strange if the legislature had not sought to amend the law in this very direction; for the six centuries between De Viris Religiosis and the Act of 1888 that saw the break-up and disappearance of the feudal system also saw the term of years gaining greatly in importance as a common form of property, and to an extent which Parliament could not afford to ignore in any enactment meant to control the holding of land by bodies with a perpetual succession.

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[7] 37 Ch.D. 674.

I therefore conclude that in subsection (1) the expression "Land shall not be assured" is capable of applying to the making or assignment of a lease; and this being so, I think the word "land" must have a corresponding meaning in the other parts of the subsection so that in the event of a forfeiture "the "land . . . forfeited" will be the estate or interest assured in breach of the subsection. It is this last application of the definition which may work the most striking departure from De Viris Religiosis as forfeiture under that statute was of the fee alone. But to avoid this by applying the definition to the beginning though not to the end of the subsection does not seem possible; the language of the text does not require or suggest such a distinction, and to adopt it would be to create a confiscatory situation capable of producing, in the changed conditions of 1888 and since, the most inequitable results. If, then, a term of years is created or assigned in breach of subsection (1), it is the lessee's interest, and not a superior interest, that becomes subject to the forfeiture provisions.

The next question to be considered concerns the significance of the words "in mortmain" which come immediately after the word "corporation" in subsection (1). If the views I have already expressed are correct, it follows, on the facts of this appeal, that the land has been assured, within the meaning of the subsection, to a corporation—Arffe Ltd.—without authority. But was this an assurance to that corporation in mortmain? If so, the case will be within the subsection, but if not, the subsection will not apply and no question of forfeiture can arise.

The point here, as I understand it, calls for a choice between two views—(1) that the expression "in mortmain" connotes the situation which arises whenever land is assured to a corporation and therefore adds nothing to what precedes it in the text, and (2) that the expression has a long-standing technical import which qualifies the transaction described and so excludes from the subsection those assurances which, before the Act of 1888, would not have been regarded as bringing the land into mortmain.

My Lords, it must be conceded that the mischief to which the law of mortmain has been directed has changed with the times; but the term itself occurs in De Viris Religiosis and seems to have signified throughout its long user an alienation which, by its nature, made it likely, or at least possible, that the land would thereafter remain in one hand for a very long period. The purposes of the grant and the capacity of the grantee to continue in existence were, therefore, highly relevant matters. And I venture to think that for the same reasons the character of the interest granted must have been regarded as no less so. Such interest, for example, might be so brief or transient that it could be of little moment and make little difference whether it vested in a mortal person or an undying corporation. That line of reasoning makes it difficult to think of a short term of years as being the subject of an alienation in mortmain, and I am of opinion that the law had long been settled in favour of that view when the Act of 1888 came to be passed. This seems to be the conclusion to which one is necessarily brought by the cases and text-writers that are listed in Tudor on Charities, 5th ed., at p. 415, and Halsbury, 2nd ed., Vol. VIII, at p. 83, note (g). These citations span a long period—from the Year Book 3 Edw. 4 to *Truro Corporation* v. *Rowe* [8]—and, despite differences as to the effect of the Act of 1888, both of the standard works to which I have just referred seem at one in accepting the proposition that before that Act the assurance of a short term to a corporation was not an assurance in mortmain; or, as Wills J. put it with regard to the holding in question in *Truro Corporation* v. *Rowe* [9]: "The Statutes of Mortmain appear to me to have nothing to do "with a short lease of 14 years."

This conclusion as to what was excluded from the conception of mortmain before 1888 leads me to adopt the second of the views enumerated above. The words "in mortmain" have not

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[8] [1901] 2 K.B. 870; 17 T.L.R. 773; (C.A.) [1902] 2 K.B. 709; 18 T.L.R. 820.

[9] [1901] 2 K.B. 870, 875.

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been defined, and I see nothing in the definition of "land" or elsewhere in the Act to justify the assumption that they are now mere surplusage and apt to include a type of disposition which the law on the subject had ignored for so long on account of its impermanence. I would therefore hold that, though subsection (1) applies to leaseholds, the effect of the words "in "mortmain" is to exonerate the short term.

What, then, distinguishes the short term from the longer term that these words will allow to remain within the subsection? Some writers would draw the line at 99 years and hold terms not exceeding that to be outside mortmain. In my opinion the authorities do not go the length of fixing this or any other hard-and-fast line of division. That, however, raises no real difficulty on the facts of this case as I see them. Here, all that could pass to Arffe Ltd. was the fag-end of a lease which had less than five years to run. If the views I have expressed are right, such an interest would have been incapable of alienation in mortmain before 1888 and should still be so regarded.

That is enough to determine the appeal in favour of the appellant. But if I am wrong in the opinion I have formed concerning the words "in mortmain," I would still allow the appeal on the grounds (a) that in subsection (1) the expression "shall be forfeited" means "shall be liable to be forfeited" and does not connote an automatic forfeiture, and (b) that the Crown has not taken and declines to take any step to enforce such forfeiture as may have been incurred.

There is no question as to ground (b). As to ground (a), the considerations which bear on this conclusion and which, in their conjoint effect, seem to me to make it the proper interpretation may be enumerated as follows. (1) The word "forfeited" may in its natural usage signify either an actual forfeiture or a liability to forfeiture. See *per* Kay J. in *In re Levy's Trusts* [10] and *Quesnel Forks Gold Mining Co. Ltd.* v. *Ward.*[11] (2) The concluding words of subsection (1)—"and Her Majesty may enter "on and hold the land accordingly"—follow the permissive form which is used in subsection (2) in connexion with the clearly optional right of entry which it confers upon mesne lords. "Shall" instead of "may" would have been the appropriate word here if the view taken by the Court of Appeal is well founded; and the far-reaching consequences for the Crown of that view, which I advert to later, give added significance to the wording of the text at this point. (3) Under the earlier statutes

[10] (1885) 30 Ch.D. 119.

[11] [1920] A.C. 222.

the offending assurance was voidable and not void. The language of section 1 and the procedure for which it provides indicate that this is still the position and that, while the forfeiture, if enforced, relates back to the date of the assurance, there is no automatic forfeiture as soon as the assurance is perfected. The right of entry given to mesne lords by subsection (2) may be exercisable for as long as 18 months after the date of the assurance, and paragraph (iv) of that subsection enacts that if such right of entry is exercised by a mesne lord "the land shall be forfeited "to that lord from the date of the assurance instead of to Her "Majesty." This wording and the absence of any provision for a transfer from Her Majesty to the mesne lord electing to enter indicate, fairly clearly, as I think, that the interest assured was intended to remain in the corporation taking in breach of the section until the forfeiture was enforced. If so, the final words of subsection (1) cannot be meant to provide for an automatic forfeiture to the Crown upon the assurance being made, and the significance of the permissive "may enter and hold" is again emphasized. (4) While the expression "the land shall be "forfeited" in paragraph (iv) of subsection (2) undoubtedly uses the word "forfeited" to connote an actual forfeiture, the nature of that paragraph puts any other meaning out of the question, for it is only concerned with what is to happen when a mesne lord has decided to exercise his right of entry and so enforce the forfeiture. This context is so different from that of subsection (1), and the word itself is so apt to take the colour of its surroundings, that it seems to me impossible to argue upwards, as it were, from paragraph (iv) in this connexion. (5) There is nothing to suggest that the policy of the Act of 1888 required a sharper sanction, in the shape of automatic forfeiture, than the liability to forfeiture which had sufficed during the currency of the earlier statutes. (6) To construe subsection (1) as providing for automatic forfeiture denies the Crown any right to refuse acceptance of the forfeited interest, although subsection (2) admittedly respects the feudal dispensation to the extent of according such a right to those holding under the Crown. (7) If, however, that construction is sound and the effect of the operation of subsection (1), in the case of a lease or assignment, is to vest the same immediately in the Crown, it is, I think, hard to stop there and resist the ultimate conclusion reached by the Court of Appeal to the effect that the Crown steps into the shoes of the lessee and becomes liable under the lessee's covenants. But if this is the position, it would lead, in circumstances which cannot be considered either fanciful or unlikely, to extraordinary results. Take, as an instance, the case of a lease to a corporation. Subsection (1) forbids the intending lessor, no less than the intending lessee, to complete the transaction without a licence. The lease is made without a licence in breach of the subsection. On the present hypothesis the Crown thereupon becomes bound to hold as tenant of the transgressing lessor under an instrument which it has not authorized and may even have refused to authorize. In addition, it may find itself bound by onerous stipulations designed by and calculated to benefit the transgressing lessor. The position of the Crown as an involuntary assignee might well be equally embarrassing and anomalous, and I think the facts of the present case, and of *Morelle Ltd.* v. *Waterworth*[12] and *Morelle Ltd.* v. *Wakeling*,[13] go to show this. Consequences such as these cannot be disregarded as incidental or remote. I find it impossible to ascribe to the legislature an intention to bring such consequences about, and so make the Crown an open receptacle for all such onerous interests as might be transferred or created in breach of the statute. I therefore think that the construction which avoids consequences of this abnormal nature should be preferred, and this all the more, as to hold otherwise would be to bind the Crown to its prejudice by an implication which, to say the least, is open to argument. No doubt it can be said that such consequences would, in part, be due to deciding that a leasehold may be the subject of forfeiture under the Act of 1888. But, if, as I think, that decision is inescapable having regard to the definition of "land," the case for avoiding such strange and irrational results by reading "forfeited" as "liable to be forfeited" remains unimpaired.

My Lords, as this conclusion also suffices to dispose of the appeal, I do not propose to examine or express an opinion upon the effect of the registration of the leasehold in the name of Arffe Ltd. under the provisions of the Land Registration Act, 1925.

For the reasons stated I would allow the appeal, discharge the declarations made by Harman J. and affirmed by the Court of Appeal, and answer question 1 (a) as set out in the summons in the affirmative.

LORD COHEN. My Lords, the questions for your decision may be stated as follows: 1. Did the transfer to Arffe Ltd., for valuable consideration, of the unexpired residue of the term of

[12] [1955] 1 Q.B. 1.

[13] [1955] 2 Q.B. 379.

99 years from September 29, 1858, created by a lease dated August 11, 1862 (which transfer was registered at the Land Registry on February 21, 1953), offend against section 1 of the Mortmain and Charitable Uses Act, 1888? 2. If so, did that unexpired residue vest in Her Majesty automatically by reason of the transfer, or would it only so vest upon performance of some act (e.g., entry) on behalf of Her Majesty evidencing her determination to enforce forfeiture?

The case for the respondents on the first question has the merit of simplicity. They say that (1) under section 3 of the Mortmain and Charitable Uses Act, 1891, "land" includes tenements and hereditaments of any tenure and therefore includes leaseholds, and it follows that leaseholds must not be assured to any corporation in mortmain otherwise than under the authority of a licence from Her Majesty; (2) the transfer to Arffe Ltd. was a transfer of land, and under section 10 of the 1888 Act "assurance" includes transfer; (3) it was an assurance in mortmain, since, to quote Stroud's Judicial Dictionary, 3rd ed., Vol. III, p. 1838, "'Mortmaine' signifies an alienation of lands "and tenements to any guild, corporation, or fraternity"; Arffe Ltd. was a corporation; it was incorporated in Eire; it did not deliver to the Registrar of Companies any documents for registration under section 10 of the Companies Act, 1948, nor was it granted a licence to hold land in mortmain, and consequently had no authority to hold land in mortmain.

My Lords, I am not prepared to dissent from the answer in favour of the respondents given by the Court of Appeal in *Morelle Ltd.* v. *Waterworth*[14] to the first question I have posed. It is, I think, clear that by 1888 the expression "tenements and "hereditaments . . . of any tenure" would have been held by the courts, in the absence of any context restricting the meaning of the words, to be wide enough to include leaseholds. Any transfer of "land" within the meaning of the Mortmain and Charitable Uses Acts is clearly an assurance within the meaning of the Acts. The question which has given me some difficulty is whether the transfer of a leasehold interest can be said to be a transfer *in mortmain*.

The Acts contain no definition of "mortmain." It is, therefore, in my opinion, proper to assume that the legislature in the 1888 Act used the word in the same sense as it was used in the statutes as to mortmain in force immediately before the passing of the 1888 Act. Under those statutes, and in particular under the Statute of Mortmain, 7 Edw. 1, made November 15, 1279, it was held that the grant of a short lease did not offend against the statute. Therefore, it was argued on behalf of the appellant, the transfer of a term of which only about four years remained unexpired could not be a transfer in mortmain. The answer to this argument is, I think, that the reason why the grant of a short lease was held not to offend against the statutes was solely because on the wording of the 1279 statute short leases were not lands or tenements within the meaning of the statute. If this be the right view, it necessarily follows that this ratio decidendi no longer applies since the wide definition of "land" in the 1888 and 1891 Acts brings leaseholds of any length within the mischief of the Act.

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[14] [1955] 1 Q.B. 1.

It is said that such a decision would lead to strange consequences imposing heavy liabilities on the Crown, but this consideration ought not to affect your Lordships' construction of the statute. Moreover, the consequences will only follow if your Lordships answer the second question I have posed by holding that the forfeiture to Her Majesty is automatic.

The case made by counsel for the respondents on this point also is simple. He admits that the word "forfeited" is capable of meaning "liable to be forfeited," but he says that its primary meaning connotes immediate forfeiture. He points out that that is the meaning which the word must bear in paragraph (iv) of subsection (2) of section 1 of the 1888 Act. He submits that a different meaning should not be attributed to it in subsection (1) from that which it must bear in subsection (2).

Despite its attractive simplicity, I am unable to accept this argument. If it were accepted, little effect can be given to the words at the end of subsection (1) "and Her Majesty may enter "on and hold the land accordingly." It was suggested that these words were inserted to make it clear that Her Majesty was entitled to enter before the period of the option given to mesne lords by subsection (2) had expired. I doubt if that was the purpose of these words, and it seems to me that the words are far more appropriate if in subsection (1) "forfeited" is read as meaning "liable to be forfeited." Moreover, the respondents' construction connotes that if a mesne lord exercises his right of entry, the title will pass to him not from the person who has executed the offending assurance but from Her Majesty, whereas paragraph (iv) of subsection (2) provides that the land shall be forfeited to the mesne lord from the date of that assurance instead of to Her Majesty.

H. L. (E.)

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If the respondents' contentions on this point were well founded, a radical change would indeed have been effected by the 1888 Act, for it is admitted that under the law in force before that Act was passed the forfeiture did not become effective until Her Majesty took steps to enforce it. I am unable to accept the view that if Parliament had intended such a radical alteration, it would have effected it by such ambiguous language. I would add that if the respondents' argument were well founded, the effect of the alteration would be to enable a tenant who wished to escape his obligations to do so by transferring them to Her Majesty against her will.

Having reached this conclusion, it is unnecessary for me to consider whether, if I had been of opinion that the consequence of an assurance of land not registered under the Land Registration Act, 1925, offending against the Mortmain and Charitable Uses Act, 1888, was immediate forfeiture, the position would be altered by the fact that the land in the present case was registered under the 1925 Act in the name of Arffe Ltd. In *Morelle Ltd.* v. *Wakeling*[15] the Court of Appeal held that registration did not affect the matter. I must not be taken either as agreeing with or dissenting from that decision.

There is only one other point I need mention. The Attorney-General and Mr. Cross argued that if there was an automatic forfeiture, it was of the fee simple and not of the leasehold interest. In my opinion the foundation for this argument disappears, if I am right in the opinion I have expressed, that the definition of "land" in section 3 of the 1891 Act includes leaseholds.

For the reasons I have stated I would allow the appeal, and answer the question stated in paragraph 1 of the originating summons in this matter in the sense indicated in sub-paragraph (*a*) of that paragraph, subject to the correction of the date which appears therein, by substituting "September" for "October." The second question does not arise.

Appeal allowed.

Solicitors: *Treasury Solicitor; Meredith, Hardy & Hutchison for Lamb, Brooks & Bullock, Odiham.*

F. C.

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[15] [1955] 2 Q.B. 379.

J. C.*

1956
Mar. 8.

COMPTROLLER OF INCOME TAX . . . APPELLANT;

AND

HARRISONS AND CROSFIELD (MALAYA) LTD. . . . . RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL OF THE SUPREME COURT OF THE FEDERATION OF MALAYA.

Malaya — Revenue — Income tax — Company — Dividend — Paid out of "chargeable income" for year of assessment — Discretionary statutory deduction—Failure of comptroller to exercise discretion —Practice—Matter remitted to comptroller for discretionary consideration—Income Tax Ordinance, No. 48 *of* 1947, *of the Federation of Malaya (as amended by the Income Tax (Amendment) Ordinance, No.* 6 *of* 1951), *ss.* 39 (*a*) *proviso,* 75 (1).

Revenue.

By section 39 of the Federation of Malaya Income Tax Ordinance, 1947, as amended up to and including the year 1951: ". . . there shall be levied and paid for each year of assessment "upon the chargeable income of—(*a*) every company, tax at the "rate of 30 per centum on every dollar of the chargeable income "thereof; . . . Provided that where any company proves to the "satisfaction of the Comptroller that any dividends have been paid "out of such chargeable income, . . . an amount equal to such "dividends . . . may be charged at a lower rate or not charged "with any tax as the Comptroller shall determine."

In November, 1950, the respondent company declared a dividend in respect of the profits of its trading year which had ended on June 30, 1950. From that dividend it deducted, as authorized by statute, income tax at the then prevailing rate applicable to companies of 20 per cent. Those profits for the year ended June 30, 1950, were subject to assessment to income tax in the year of assessment 1951, and from January 1, 1951, the rate of tax on companies was increased to 30 per cent., as now provided by section 39 (*a*) of the Ordinance. Thereupon the respondent company applied to the appellant, the Comptroller of Income Tax, to have its tax for 1951 reduced under the proviso to section 39 of the Ordinance from 30 per cent. to 20 per cent. on an amount of the assessment equal to the gross dividend which had been paid in November, 1950. The appellant contended that, for the proviso to apply, the dividends must have been paid out of the chargeable income which accrued or arose during the year of assessment itself, namely, 1951, or that, at any rate, the dividends must have been paid in that year, that they were not so paid and that therefore he had no legal power to apply the proviso in the respondent's favour:—

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* *Present*: LORD OAKSEY, LORD MORTON OF HENRYTON, LORD RADCLIFFE, LORD COHEN and MR. L. M. D. DE SILVA.

Held, that "chargeable income" was under the Ordinance the income of the year preceding the year of assessment, and the respondent's payment of dividend in November, 1950, having been paid out of its chargeable income for the year of assessment 1951, the condition required for the operation of the proviso to section 39 was satisfied. The appellant was therefore wrong in supposing that he was not legally entitled to exercise his power under the proviso in favour of the respondent, and his refusal to entertain the respondent's application was invalid. The true position was that while the respondent was an aggrieved person within the meaning of section 75 (1) of the Ordinance, its grievance consisted, not in the fact that its rate had not been reduced—the proviso did not create a legal right in the respondent to have the rate reduced—but in the fact that owing to a misconception of the law on the part of the appellant he had failed to consider whether and to what effect he ought to exercise his power to reduce it. Accordingly, the refusal to entertain the application was unfounded in law and invalid, and the appellant was directed now to take the matter properly into consideration in the exercise of his discretion.

Pioneer Laundry and Dry Cleaners Ltd. v. *Minister of National Revenue* [1940] A.C. 127; 56 T.L.R. 12; [1939] 4 All E.R. 254 applied.

Judgment of the Court of Appeal of the Supreme Court of the Federation of Malaya reversed.

Appeal (No. 27 of 1954) from a judgment of the Court of Appeal of the Supreme Court of the Federation of Malaya (Mathew C.J., Murray-Aynsley C.J. and Bellamy J.) (June 8, 1953) dismissing an appeal by the present appellant, the Comptroller of Income Tax, from a judgment of the High Court (Wilson J.) (February 11, 1953) whereby an appeal by the comptroller from a decision of the Income Tax Board of Review was dismissed and the determination of the board affirmed.

The matter arose upon an assessment to income tax made upon the respondent company by the comptroller for the year of assessment 1951 under the Income Tax Ordinance, 1947, of Malaya, as amended by subsequent Ordinances. The point in question in the appeal related to the rate of income tax which ought to be charged in respect of a part of the income of the respondent company amounting to $533,333 that was distributed by way of dividend to its shareholders in November, 1950. The respondent's trading year ended on June 30, 1950. The contention of the respondent was that the rate of tax to be charged in respect of that part of the income of the company was 20 per cent. only, being the rate of tax deducted by the company from the dividend in question in accordance with the terms of the Income Tax Ordinance then in force. By a later ordinance the rate of tax upon the profits, part of which had already been distributed as aforesaid and had been the subject of deduction of tax at the rate of 20 per cent. only, was raised to 30 per cent., and the respondent company now claimed that in the circumstances it was entitled to the relief provided by section 39 of the Income Tax Ordinance, 1947, as amended by the Income Tax (Amendment) Ordinance, 1951, and that the relief to be given ought to be by way of the reduction of the rate of tax from 30 per cent. to 20 per cent. in respect of the part of the company's profits which had already been distributed as dividend. That contention had prevailed in the tribunals below. The contention for the comptroller was that the respondent company was not entitled to the relief claimed, and that the whole of its income for the year in question should bear tax at 30 per cent.

By section 39 of the Ordinance of 1947, as amended to 1951: " . . . there shall be levied and paid for each year of assessment " upon the chargeable income of—(*a*) every company, tax at the " rate of thirty per centum on every dollar of the chargeable " income thereof; . . . Provided that where any company proves " to the satisfaction of the Comptroller that any dividends have " been paid out of such chargeable income, . . . an amount equal " to such dividends . . . may be charged at a lower rate or not " charged with any tax as the Comptroller shall determine."

1956. Jan. 26, 30; Feb. 1. *F. N. Bucher Q.C.* and *P. Shelbourne* (with them *M. P. Nolan*) for the appellant. The profits of the company for the year ended June 30, 1950, were the subject of assessment to income tax in the year of assessment 1951. In effect, from January 1, 1951, that is, the year of assessment, the rate of tax generally applicable to companies was increased from 20 per cent. to 30 per cent. The company applied to the comptroller to have its tax for 1951 reduced from 30 per cent. to 20 per cent. on an amount of the assessment equal to the gross dividend which had been paid on November 18, 1950. The comptroller refused to make any reduction.

The appellant's propositions are: (1) It has not been proved to the satisfaction of the comptroller that the dividend paid by the company in November, 1950, was paid " out of " the company's chargeable income for the year 1951. Even if the company has proved that that dividend was paid out of such chargeable income, this is no more than to show that the company was one of the class of persons whom the comptroller should take into consideration in applying the proviso. (2) In applying the proviso the comptroller is given an unfettered discretion, indicated by the use of the word "may" in the operative part of the proviso. (3) The onus is on the company to show that there is an obligation on the comptroller to exercise this power. (4) The fact that the class of taxpayers dealt with in the proviso is comprised of certain companies and certain trustees indicates that the purpose of the comptroller's power is to facilitate the administration of the tax rather than to give a legal right to relief to the company merely because it has paid the dividend. (5) The fact that the discretionary power does not prescribe any particular rate on which the relief is to be given further indicates that the purpose of the power is not to give a legal right of relief to a company.

The comptroller was entitled to take the position that the company had failed to prove to his satisfaction that the dividend paid on November 18, 1950, had been paid "out of" the company's chargeable income in the year of assessment 1951. The submission is that the chargeable income of 1951 is the real income of 1951. What the tax is being imposed on is the income of the year of assessment. While one cannot perhaps argue the meaning of a revenue statute from the meaning of a revenue statute of another country, the words of section 10 of the Income Tax Ordinance are reminiscent of the words in the United Kingdom Income Tax Act, and see *Brown* v. *National Provident Institution.*[1] It must be conceded that the assessment figure of 1951 brought in the trading figure of an earlier year—to June 30, 1950. But dividend which was paid by the company in 1950 could properly be regarded as being paid out of the notional figure, namely, the assessed figure. That is, of course, not a new conception in the United Kingdom: *Allchin* v. *Coulthard*[2]; what is said in that case indicates a view acceptable in fiscal legislation—that one can have a payment out of a notional fund, and that that notional fund represents a real fund, that is, trading income of an earlier period: it does become the chargeable income of that year. It is submitted: (1) The object of the proviso is to bring the company's rate of tax into correspondence with the shareholders' rate of tax. (2) Since the proviso can only work upon the company's rate for the year of assessment, namely, 1951, and since by section 40 the company's rate of tax affects dividends paid within the year of assessment, the presumption is that dividends dealt with in the proviso are

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[1] [1921] 2 A.C. 222; 37 T.L.R. 804.

[2] [1942] 2 K.B. 228; 59 T.L.R. 396; [1943] 2 All E.R. 352.

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those paid in the year of assessment, 1951. (3) On the construction of the proviso this result can be achieved either by construing " chargeable income " in the proviso as meaning the income of the year of assessment; or by implying in the proviso the words " paid in the year of assessment " after the word " dividends."

With regard to the discretion point, the proviso to section 39 gives to the comptroller an unfettered discretion whether to charge tax at the full rate or at a reduced rate, or to remit tax altogether. The use of the word " may " in the proviso indicates an unfettered discretion, and " shall " in the last line of the proviso is used in the future tense and not in the imperative sense. The Board of Review and the judge of first instance did not give sufficient weight to the principles to be found in *Julius* v. *Lord Bishop of Oxford.*[3] The submissions on the judgment of the Court of Appeal are: (1) They failed to give sufficient weight to the fact that the word " may " is unambiguous. Their view involves the substitution of the word " must " for the word " may " in the proviso. (2) The burden is upon any person seeking to have that permissive power imported. (3) They failed to appreciate that the applicant must show a clear legal right dependent upon the exercise of the power. (4) They failed to appreciate that the applicant must show that the purpose of the statute would be defeated if the power were not exercised. The above four propositions are supported by a number of passages in *Julius* v. *Lord Bishop of Oxford.*[4]

The company is not " a person aggrieved " by an assessment within the meaning of section 75 of the Ordinance, since the assessment is perfectly proper and correct, and this seems clear from *Ex parte Sidebotham*,[5] for the company has not suffered a legal grievance; it is merely disappointed of a benefit which it might have received. The rate of tax, it is submitted, is left to the unfettered discretion of the comptroller.

Assuming that the Board is against the appellant on the first point, it is submitted that all that the company has shown is that it is one of the classes of persons whom the comptroller should take into consideration in applying the proviso. The use of the word " may " in the operative part, and the only operative part, is an indication that that discretion is unfettered. On authority, the onus is on the company to show that this is a power to be exercised.

[3] (1880) 5 App.Cas. 214.

[4] 5 App.Cas. 214, 222, 225, 229, 234–235, 240.

[5] (1880) 14 Ch.D. 458, 465.

Roy Borneman Q.C. and *Sir Reginald Hills* for the respondent company. The company is entitled to relief in pursuance of the proviso to section 39 in respect of the rate of income tax charged on the part of its income distributed to its shareholders as dividend in November, 1950. The relief to which it is so entitled is such as will reduce the rate of income tax charged on the part of its income so distributed to 20 per cent. in substitution for the rate of 30 per cent. at which the whole income of the company has in fact been charged in the assessment for the year 1951. The construction contended for by the appellant is straining the whole purpose of the Ordinance, the whole object of which was that the company should be relieved by deduction of the tax it paid when it paid a dividend. It was not disputed in the Court of Appeal below that the dividend paid by the company in November, 1950, was paid out of the chargeable income of the company for the year of assessment 1951. To find the chargeable income of any particular year one has to adopt the actual income of the preceding year. There is no inference to be drawn from the Ordinance that the proviso is for the administrative convenience of the comptroller. The inference is to the contrary. *Allchin* v. *Coulthard* [6] and the other cases referred to were all cases on some specific words in the United Kingdom Act not appearing in the Malaya Ordinance, and have no real effect on this case at all.

Assuming that it is established that the company had proved that the dividend had been paid out of chargeable income, then, first, it is submitted that it is entitled to have this discretion of the comptroller exercised in its favour. Once that condition is satisfied the proviso imposed a duty on the comptroller to reduce the tax or to discharge it. The words " shall determine " indicate a positive duty on the comptroller in making his assessment to make his choice between the two alternatives. Secondly, in a case where the comptroller has not exercised his discretion at all, the Board of Review is entitled to exercise the discretion allowed or directed by the proviso. It is a fair inference from all the documents in this case that the comptroller had not exercised any discretion. Thirdly, the Board of Review had power to review what was done or not done by the comptroller in any event. In other words, it could review the facts of this case and had power to say what should be done.

The comptroller's reasons for declining to exercise his discretion were his view that the condition precedent to the operation of the proviso did not exist—that the company had not proved to his satisfaction that the dividends had been paid out of the chargeable income—and his belief that his view could not be challenged because he had an absolute discretion. In the circumstances of this case it is not a proper decision to send the case back to the comptroller for him to exercise his discretion. In this case he has wrongly declined to exercise his discretion; construing the proviso as it stands, the comptroller is bound to determine, and he cannot sit back and do nothing: the *Julius* case.[7]

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[6] [1943] A.C. 607.

If the comptroller is bound to determine, what are the limits of his discretion? The principles are the same whether he has two or three choices. If the choice is between the lower rate or no tax at all, or if it is between a lower rate, no tax at all, or the nominal flat rate, then the submission is that the comptroller's action is subject to review in certain cases. It is subject to review (a) if he declines to act when he should—i.e., does not in fact exercise his discretion, or (b) a fortiori if he declines to act (i) for a reason which is bad in law, or (ii) arbitrarily, or (iii) where it is clear from all the circumstances of the case that no sufficient weight has been given to relevant considerations or that weight has been given to irrelevant considerations. As to (b) (i) (supra), if a man has a discretion which he declines to exercise for a reason which is bad in law, it is appealable: *Pioneer Laundry and Dry Cleaners Ltd.* v. *Minister of National Revenue.*[8] The duty of the comptroller was an administrative duty of a quasi-judicial character, and if he acted for a reason which is bad in law, as it is submitted he did, then it is appealable and subject to review. As to (b) (iii) (supra), *Charles Osenton & Co.* v. *Johnston*[9] precisely fits the facts of this case. The Board of Review, on an appeal, exercises its own discretion in place of that of the comptroller. The case should not be sent back; the decision of the courts below should be upheld.

Sir Reginald Hills, following, referred to *Julius* v. *Lord Bishop of Oxford*,[10] *Holt* v. *Inland Revenue Commissioners*,[11] *Inland Revenue Commissioners* v. *Ross and Coulter. In re Bladnoch Distillery Co.*[12] and *Port of London Authority* v. *Inland Revenue Commissioners.*[13] There was here, as in all these tax matters, an express right of appeal. This extended right of review was intended to give a power to put the assessment right.

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[7] 5 App.Cas. 214.

[8] [1940] A.C. 127, 136; 56 T.L.R. 12.

[9] [1942] A.C. 130; 57 T.L.R. 515; [1941] 2 All E.R. 245.

[10] 5 App.Cas. 214, 234.

[11] [1947] 1 All E.R. 148, 152.

[12] [1948] 1 All E.R. 616, 629; [1948] W.N. 114.

[13] [1920] 2 K.B. 612; 36 T.L.R. 460; 12 T.C. 122.

Bucher Q.C., in reply, was not required to deal with the submission that the comptroller had a discretion as to whether the tax charged should be at the same rate or a lower rate or no rate at all.

This Board has a complete discretion to send the case back either to the comptroller or the Board of Review. The natural person to whom it should be sent back, having regard to the provisions of section 39, is the comptroller. If this proviso is dealing with a mechanical administrative matter it is peculiarly within the province of the comptroller. In the *Pioneer Laundry* case [14] the reviewing court had almost ad lib. powers to review the decision under the Act there, nevertheless the Board sent it back to the equivalent of the comptroller. In *D. R. Fraser & Co. Ltd.* v. *Minister of National Revenue* [15] no question was raised of sending the case back to the Exchequer Court—the equivalent of the Board of Review here.

March 8. The judgment of their Lordships was delivered by LORD RADCLIFFE. This appeal from the Supreme Court of the Federation of Malaya turns upon the meaning of a proviso attached to section 39 of the Income Tax Ordinance, 1947 (Malayan Union Ordinance No. 48 of 1947), as subsequently amended. The questions at issue are wholly questions of law, no facts being in dispute. To explain the nature of these questions it is necessary to make some reference to the system of income tax that has been established in the Malayan Federation.

Income tax was first introduced into the Federation by the Ordinance of 1947. Both the income of individual persons and the profits of incorporated companies fall under its charge; but whereas the chargeable income of individuals except non-residents and, generally speaking, trustees and executors, is subjected to a progressive tax at varying rates specified in a schedule to the Act, the income of companies bears tax at a flat rate. The income of non-residents and trustees and executors is also charged at a flat rate, though not necessarily at the same rate as that applicable to companies. For instance, for the year 1951, the year to which the present appeal directly relates, the company rate was 30 per cent. and the rate for non-residents and trustees and executors 20 per cent.

When a company resident in the Federation pays a dividend it has statutory authority to deduct from the amount of the dividend tax at the rate paid or payable by the company " on the

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[14] [1940] A.C. 127.

[15] [1949] A.C. 24.

"chargeable income of the year of assessment within which "the dividend is declared payable" (see section 40). Dividends themselves are included in the income of individuals that is brought under tax (section 10), they are reckoned gross without allowance for the tax deducted (section 26), and the recipient gets a set-off for the amount deducted against the tax charged on his chargeable income (section 42). These provisions have much in common with the United Kingdom system of taxing income from dividends.

Finally, it is relevant to notice what is meant by the phrase "chargeable income" in this connexion. Its meaning is built up by successive stages in the enacting part of the Ordinance. First, in Part III, entitled "Imposition of Income Tax," section 10 provides that "Income tax shall . . . be payable at the rate "or rates specified . . . for each year of assessment upon the "income of any person" derived from certain specified sources. The next part, Part IV, is entitled "Ascertainment of Income," and lays down a number of rules for the ascertainment of income, dealing with such matters as deductions or allowances for depreciation, and other matters bearing upon the nature of taxable income. Part V, headed "Ascertainment of Statutory Income," lays down the general rule that "the income of any person for "each year of assessment (hereinafter referred to as 'statutory "'income') shall be the full amount of his income for the year "preceding the year of assessment from each source of income "possessed by him at any time during the year of assessment, "notwithstanding that any such source does not produce income "during the year of assessment" (section 31 (1)). The year of assessment is itself the calendar year from January to December, and thus prima facie the income for any year of assessment would be the income, ascertained as required by the Act, which had accrued or arisen during the preceding calendar year. This would apply to incomes from trade as much as to other incomes: but with regard to incomes from trades and other profit-making enterprises, the Comptroller of Income Tax is authorized to accept the profits of the previous accounting year instead of the previous calendar year as constituting the statutory income, if he is satisfied that the business accounts are usually made up according to such an accounting period. Thus, the respondent's statutory income for the year 1951 consisted of its profits for the trading year which ended on June 30, 1950. Next, in Part VI of the Ordinance, "Ascertainment of Assessable Income," section 33 (1) provides "The assessable income of any person from all "sources chargeable with tax under this Ordinance for any year "of assessment shall be the remainder of his statutory income "for that year" after allowance for certain further deductions, such as business losses and charitable contributions. Finally, there emerges from this process what is called in Part VII a "chargeable income," itself defined in the following terms "The "chargeable income of any person for any year of assessment "shall be the remainder of his assessable income for that year "after the deductions allowed in this Part of this Ordinance have "been made." The deductions then specified are, in effect, personal allowances and life insurance relief.

It is in the context of this taxation scheme that the provisions of sections 38 and 39, which begin Part VIII, must be read. These sections (as amended up to and including the year 1951) are as follows:—

"38. There shall be levied and paid for each year of assessment upon the chargeable income of every person, other than a "company, a person not resident in the Federation, a trustee "(not being the trustee of an incapacitated person), or an "executor, tax at the rates set forth in the Second Schedule to "this Ordinance.

"39. Subject to the provisions of section 36 of this Ordinance, "there shall be levied and paid for each year of assessment upon "the chargeable income of—

"(*a*) every company, tax at the rate of thirty per centum on "every dollar of the chargeable income thereof;

"(*b*) every person not resident in the Federation, trustee "(other than the trustee of an incapacitated person), and executor, tax at the rate of twenty per centum on every dollar of the "chargeable income thereof:

"Provided that where any company proves to the satisfaction "of the Comptroller that any dividends have been paid out of "such chargeable income, or any trustee proves to the satisfaction "of the Comptroller that any beneficiary of the trust is entitled "to a share of the trust income, an amount equal to such "dividends in the case of a company or a corresponding share of "the statutory income of the trustee in the case of a trust may "be charged at a lower rate or not charged with any tax as the "Comptroller shall determine."

The present proceedings relate to the respondent's income tax for the year of assessment 1951. What happened was that in November, 1950, the company declared a dividend of $533,333 in respect of the profits of its trading year which had ended on the preceding June 30. From that dividend it deducted income tax at the rate of 20 per cent., being the rate payable on company profits for the assessment year then current (as section 42 permitted) and accordingly paid a net dividend of $426,667 to its shareholders. For the year of assessment 1951 the rate of tax on company profits was raised to 30 per cent., as section 39 (*a*) now provides. Thereupon the respondent applied to the appellant for a reassessment of its tax for 1951 on the ground that under the proviso to section 39 a rate of 20 per cent. only ought to be charged on that part of its chargeable income for 1951 which was equivalent to the gross amount of dividend, namely, $533,333, paid in November, 1950. The appellant refused to admit the respondent's right to this reduction of rate. The Board of Review constituted under the Income Tax Ordinance, to whom the respondent appealed, overruled this refusal and awarded to the respondent the reduction of rate which it claimed: and both the High Court and the Court of Appeal have upheld this award.

The first question which their Lordships must deal with is the appellant's reason for his refusal. There is no doubt what the reason was. From the beginning he maintained that the dividends paid in November, 1950, were not paid out of the chargeable income of the year of assessment 1951 within the meaning of those words in the proviso to section 39 and therefore that he had no legal power to apply the proviso in the respondent's favour. That is a legal point which relates to the construction of the words of the Ordinance. There seems some reason to suppose that the point was as good as abandoned before the Court of Appeal, and it is clear that it was passed over without any real argument. But the court felt at liberty to express its own view upon it; and in the circumstances their Lordships thought it best to allow the point to be fully argued before them, if only to avoid the unsatisfactory situation that might result from dealing with the other points of law arising on the section 39 proviso upon a hypothesis as to the conditions of its operation which might itself be incorrect.

The appellant's case is that, for the proviso to apply, the dividends in question must have been paid out of income which accrues or arises during the year of assessment itself, viz., 1951. Alternatively, he says that at any rate the dividends must have been paid during that year. But this is to give to the words "chargeable income" a meaning for this purpose which is flatly in contradiction with the meaning which has been built up for them by the previous sections of the Ordinance to which reference has been made. "Chargeable income" is derived through

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" assessable income " from " statutory income "; and " statutory " income " is the income of the preceding year, calendar year or accounting year. " Chargeable income " is therefore the income of the preceding year, less certain prescribed allowances and deductions. There is nothing in the context of the proviso which can give it a different meaning. The appellant invokes the familiar conception of the United Kingdom tax system that computation by a previous period as basis is merely a way of measuring the income of the year of charge and that it is that income which remains the true subject of charge. But even if their Lordships were to accept his assumption that the somewhat metaphysical theory of the United Kingdom system has any application to sections 10 and 31 and the other relevant sections of the Malayan Ordinance, it would remain clear that the words " chargeable income " have a precise statutory meaning under the Ordinance which precludes the application to them at any rate of any such theory.

All the courts in Malaya before whom this point has come have taken the same view that the respondent's payment of dividend in November, 1950, did satisfy the condition required for the operation of the proviso. In their Lordships' opinion they were right. It follows that the appellant has been wrong throughout in supposing that he was not legally entitled to exercise his power under the proviso in favour of the respondent.

The next question is, what is the effect of the proviso. Again, all the courts in Malaya have taken the same view. In their view the appellant had no discretion whether or not to exercise the power which the proviso gave him. Not only was it his duty to make some reduction of rate in favour of the respondent, but it was, apparently, his positive duty to charge an amount of the chargeable income equivalent to the gross amount of the dividends at a rate of 20 per cent. instead of the rate of 30 per cent. ruling for the year. The order of the Board of Review stands in that form and no appeal against it has succeeded. It is not entirely clear from the judgments in the High Court and the Court of Appeal in what terms the judges analysed the appellant's duty; but the words of the Court of Appeal's judgment—" The conclusion, therefore, at which we arrive is that the answer to the first " question is that the comptroller, in the particular circumstances " set out in the proviso, cannot leave the rate of tax unaltered " and is bound either to charge at a lower rate (namely, twenty " per centum) or at no rate in his discretion "—seem to assume that the respondent must reduce the rate to at least 20 per cent.

In their Lordship's opinion this construction of the proviso is misconceived. The Ordinance has said that the specified amount of income may be charged at a lower rate or may be exempted from tax as the appellant shall determine, and some compelling reason has to be found if these words, which prima facie connote that the appellant, the assessing authority, may or may not put the proviso into operation, are to be read as meaning that he must put it into operation whenever the prescribed condition as to dividends has been satisfied. If the words themselves connote that the appellant has an initial discretion whether to act at all separate from his discretion as to what reduced rate (down to nil) is to be fixed if there is to be a reduction, it is necessary to find something in section 39 itself or the general context which converts this apparent discretion into a peremptory duty.

The respondent has sought to find the necessary implication by arguing that the true and, perhaps, the only purpose of the proviso is to deal with the difficulty in which it is itself involved —that is, an increase in the flat rate of tax on company profits which leaves a company that has paid a dividend in the preceding year out of those profits with a recoupment of tax from its shareholders less than the tax that it subsequently has to bear upon the amount of profits distributed. And this seems to be the line of argument that has commended itself to the courts in Malaya. It is true, of course, that in such a case a company fails to pass on to its shareholders the full burden of income tax on the profits it distributes: and the fact that the tax system has failed to provide it with the means of doing so might be thought to justify an exercise of the proviso to the extent of a remission of tax on its profits by the Revenue. It is true, at any rate, that the powers of the comptroller were used for an analogous purpose in 1948, the opening year of the income tax régime. On the other hand, it is worth remarking that the tax system of the United Kingdom does not attempt to harmonize the rate at which income tax is charged on profits with the rate at which a company may deduct the tax from dividends by way of recoupment; and if the tax charge on the company's income is not regarded as being merely an indirect method of charging the shareholders' incomes that is no sufficient reason why it should.

However this may be, their Lordships are satisfied that there is nothing which allows it to be said that the proviso is exclusively concerned with the situation that results when the company rate rises from one year to another; and nothing, accordingly, which obliges the appellant to make the adjustment of rate for which the respondent contends. The qualifying condition is not that dividends have been paid out of chargeable income in a year when a lower rate ruled, but simply that dividends have been paid out of chargeable income. Secondly, if the proviso really concealed a statutory scheme to bring about this sort of adjustment, it should equally have provided for increasing the rate of tax on a company which had paid dividends out of chargeable income in a preceding year of assessment when a higher current rate was in operation: for in that case the company would have gained, not lost, at the expense of the shareholders. Yet nothing is provided for except reduction of rate or complete exemption from tax. Finally, there is no reasonable answer to the question why the legislature expressed itself in the permissive form that it adopted, allowing expressly a discretionary rate of reduction, if its true intention was to bring about an automatic and fixed reduction of rate whenever dividends had been paid as prescribed and the company rate of tax was increased.

The appellant, on the other hand, propounds a very different explanation of the purpose of the power given to him by the proviso. According to his argument, the object of reducing the rate of tax on the distributed part of a company's profits is to enable that part of the profits which by distribution has passed into personal income and so come within the range of progressive taxation to be charged at a rate equivalent to the effective rate of tax on that part of the shareholder's or shareholders' income. There is this much to be said in favour of this explanation, that a company's power to recoup itself in dividends at its current rate bears hardly to some extent on a shareholder whose effective rate on his dividend is much below that rate, and who has to wait to settle his accounts with the Revenue before he can get the benefit of the difference. Moreover, the Ordinance has (by amendment) associated the power to reduce the rate of tax on company profits with the power to reduce the rate of tax on trust income, the one proviso covering both; and in its application to trust income it does not seem possible to find any purpose in the proviso except to reduce the flat rate on trust income to the effective rate which is appropriate to that part of the beneficiary's income. Their Lordships are not prepared to say that the appellant's argument on this point is ill-founded, though they entertain considerable doubt whether, if this be the purpose or one of the purposes of the proviso, it has been created in a form which will allow it to serve as a satisfactory instrument for that purpose in the case of company profits, since the situation envisaged is that a dividend will have been paid and the company's deduction, therefore, made before the power to reduce the company's rate can ever be invoked. Moreover, the effective individual rate on dividends may vary with each shareholder.

In these circumstances their Lordships take the view that it is impossible for any court of law to choose between these proffered explanations of the purpose of the power, since there is no material provided by the wording or context of the Ordinance upon which a legal choice or rejection can be made. This is a case in which the makers of the Ordinance have seen fit to create a discretion in the assessing authority to exempt part of income from taxation or to reduce the rate of tax. They have prescribed the condition upon which alone that power can arise but, having done that, they have chosen words which indicate that the power is permissive, not mandatory, and they have made no further regulation as to the nature or object of the power. The situation thus brought about is exceptional and not necessarily satisfactory. It is possible that the Ordinance needs reconsideration on this point. But, however that may be, it is not open to a court of law to take over the work of law making and to create for the taxpayer a legal right to have the discretionary power exercised in his favour in a particular way. Yet, without the introduction of some such illegitimate conception, how can a discretion which, on any view, covers a power to fix any rate from something below 30 per cent. to nothing be converted into a fixed duty to charge at 20 per cent?

It remains to consider what order ought to have been made by the Board of Review on the respondent's appeal to it. The appellant raised a preliminary point before the board and subsequently maintained before the courts that no appeal could be made against his action, apparently on the ground that the application of the proviso was a matter entirely within his discretion. Probably what he meant was not that an appeal did not lie, but that no ground would appear for interfering with his discretion. But such an objection could not possibly succeed in the circumstances of this case, in which the appellant has in fact never attempted to exercise his discretion at all, through his mistaken belief that in law it was not open to him to do so. His objection was rightly rejected in all courts. On the other hand, the order that has been made in the respondent's favour is based on the view that the proviso creates a legal right in the respondent to have the rate reduced, which view, as their Lordships hold, is itself ill-founded. The true position is that, while the respondent is an aggrieved person within the meaning of section 75 (1) of the Ordinance, its grievance consists, not in the fact that its rate has not been reduced, but in the fact that, owing to a misconception of the law on the part of the appellant, he has failed to consider whether and to what effect he ought to exercise his power to reduce it.

Their Lordships are of opinion that the right thing to do is to direct the appellant to take the respondent's application into consideration and to deal with it upon the basis of the law as now explained. This is not a case in which the court ought to substitute a decision of its own for the discretion vested by statute in the assessing authority and so send the assessment back to the appellant with a direction as to the amendment that he ought to make. In some cases that is the appropriate action for a court to take (see *Minister of National Revenue* v. *Wright's Canadian Ropes Ltd.*[1]). But here the appeal courts, from the Board of Review upwards, have had to deal with a failure to consider the exercise of a power, intended by the Ordinance to be entrusted to the assessing authority, when the failure has arisen from no other reason than that the authority believed that in law the condition had not arisen which authorized the power to be put into operation. In these circumstances the best way of carrying out the purpose of the Ordinance is to follow the course taken in *Pioneer Laundry and Dry Cleaners Ltd.* v. *Minister of National Revenue* [2] by treating the appellant's refusal to entertain the respondent's application as being unfounded in law and therefore invalid, and directing him now to take the matter properly into consideration.

Their Lordships will humbly advise Her Majesty that the appeal should be allowed: that the orders of the Board of Review dated August 26, 1952, of the High Court dated February 11, 1953, and of the Court of Appeal dated June 8, 1953, should be reversed, except so far as the first-mentioned order holds that the respondent's dividends paid in 1950 were paid out of the chargeable income for the year of assessment 1951: and that in lieu thereof should be declared (1) that the appellant's refusal to entertain the respondent's application dated February 27, 1952, for the exercise of his power under section 39 of the Income Tax Ordinance was invalid, and (2) that the appellant ought now to proceed to take the said application into consideration on the footing that the dividends referred to were paid out of such

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[1] [1947] A.C. 109.

[2] [1940] A.C. 127; 56 T.L.R. 12; [1939] 4 All E.R. 254.

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chargeable income. Having regard to the fact that throughout the proceedings each party has in effect contended for a position which in law is not maintainable, their Lordships think that each should pay his or its own costs of the hearings and of this appeal.

Solicitors: *Charles Russell & Co.; Stephenson, Harwood & Tatham.*

J. C.*
1956
April 30;
May 14.

RAMSOOK RAMLOCHAN . . . . . . APPELLANT;

AND

THE QUEEN . . . . RESPONDENT.

ON APPEAL FROM THE COURT OF CRIMINAL APPEAL FOR TRINIDAD AND TOBAGO.

Trinidad and Tobago—Criminal law—Practice—Retrial—Accused not entitled as of right to access to judge's notes of previous trial—Murder—Alternative theories of how crime was committed—Inferences from evidence—Not a change of front by prosecution.
Criminal Law.

The appellant having been convicted of murder at a second trial —the jury at the first trial having disagreed—contended on appeal that he was prejudiced in his defence at the second trial through his counsel being refused a copy of, or access to, the judge's longhand notes of the first trial—no shorthand note having been taken of the evidence given at the first trial:—

Held, that, apart from any statutory provision, a party is not entitled as of right to access to a judge's notes of a previous trial for use in a subsequent trial.

Rex v. *Boysie Singh* (1950) XI Tr.L.R. 17 considered.

The appellant also contended that during his cross-examination at the second trial certain improper and prejudicial questions were put to him for the first time which represented a complete change of front in the case for the prosecution by suggesting that the blow which caused the death was struck not by the appellant but by another man—who was not tried—and that the appellant was aiding and abetting, and that those questions were taken up later by the judge and made matter for consideration by the jury:—

Held, that there was no illegitimate or improper exercise of counsel's right and duty to cross-examine the appellant. There was no change of front in the conduct of the case by the prosecution. The Crown was not bound to state its theories in advance;

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* *Present*: LORD OAKSEY, LORD TUCKER and LORD KEITH OF AVONHOLM.

they were inferences from the evidence, and there could not be extracted from the evidence for the prosecution that the Crown had tied itself to any view of how the murder was committed. In cross-examination counsel was bound to put to the appellant any inferences from the evidence which he proposed to put to the jury. So, also, in his summing-up, the judge was entitled to state to the jury the alternative inferences which might be drawn from the evidence as to the manner of the murder. On the circumstantial evidence in this case it was open to the jury to take the view that the appellant committed the deed alone or that he committed it with the assistance of some other person, and in either case he was guilty of murder.

Judgment of the Court of Criminal Appeal for Trinidad and Tobago affirmed.

APPEAL (No. 46 of 1955) in forma pauperis by special leave from a judgment and order of the Court of Criminal Appeal of Trinidad and Tobago (Perez C.J., Gomes and Archer JJ.) (July 29, 1955) affirming the conviction of the appellant at the San Fernando Assizes, Trinidad (Celestain J. sitting with a jury) (June 3, 1955) for the murder of Minwatee Ramlochan (also called Toy) on June 12, 1954, at Fyzabad. The appellant, then 22 years of age, was sentenced to death on June 6, 1955.

The body of the deceased, a girl aged about 13 years, whom the appellant had married according to Hindu rites although he had a wife living whom he had not divorced, was found fully clothed about 100 yards from the appellant's house, decapitated by some instrument such as a cutlass. There were no eye-witnesses of the murder, and no or very little blood at the place where the body was found. It had never been discovered where she was murdered. The accused, who had pleaded not guilty and relied on an alibi, had throughout maintained that the girl was alive when he left her on the morning of June 12.

The appellant was first tried in March, 1955, when the jury disagreed. He was convicted at a retrial on May 18, 1955.

The appellant maintained on this appeal that he had been prejudiced in his defence at the second trial through his counsel being refused a copy of, or access to, the judge's notes of the first trial.

Another ground of appeal was that in the middle of the cross-examination of the appellant at the trial prosecuting counsel put questions suggesting that the blow was struck not by the appellant but by a named man—who was not tried—and that the appellant was aiding and abetting. That story, it was said, had no evidence to support it, and it was too late to take the point.

The facts appear fully from the judgment of the Judicial Committee.

1956. March 20, 21; April 16, 30. *T. O. Kellock* and *Sirimevan Amerasinghe* for the appellant. There are four grounds of appeal: (1) After the jury had disagreed at the first trial counsel for the appellant, in preparation for the second trial, applied to the trial judge for a copy of his notes of the first trial. There are no shorthand notes of these trials taken in Trinidad and Tobago, and the judge's notes are of course the essential record of what took place. There was at that time a decision of the Court of Criminal Appeal of Trinidad and Tobago, *Rex* v. *Boysie Singh*,[1] to the effect that where there was a retrial and it was desired to prove at the second trial inconsistent testimony of witnesses, the judge's note was the best evidence of such testimony. In this case the Court of Criminal Appeal said that *Rex* v. *Boysie Singh*[1] was wrongly decided. Counsel's application for the notes was refused by the trial judge. The accused man was thus deprived of a fair trial, and it was contrary to natural justice in that he was deprived of the opportunity of putting to witnesses for the prosecution what they had said at the previous trial.

(2) Throughout the preliminary proceedings and the first trial and the opening of the second trial right up to the cross-examination of the appellant the prosecution case had been that the appellant himself had struck the blow that decapitated the wife. In the middle of the cross-examination of the appellant prosecuting counsel put a long series of leading questions suggesting that the blow was struck not by the appellant but by a named man—who was not tried—and that the appellant was aiding and abetting. That story had no evidence to support it, and it was then far too late for the prosecution to change the nature of the case against the appellant. The judge, however, accepted the theory and summed up entirely on the basis that the appellant was aiding and abetting and did not strike the blow. The whole case changed in the middle of the cross-examination of the appellant.

(3) There was no evidence of aiding and abetting at all, and no direct evidence of a preconcerted plan.

(4) In his summing-up the judge failed to make it clear that mere presence at the murder is not aiding and abetting, and there was no direction on the evidence as to the necessity of the jury

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[1] (1950) XI Tr.L.R. 17.

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being satisfied that there was evidence of common design. It is submitted that the conclusion from reading the whole of the summing-up is that the jury could only have taken the view that if they found that the appellant was there when the murder took place, they must find him guilty. It was of the greatest importance that the judge should have explained to the jury what evidence there was, in his opinion, on which they could form the conclusion that there was a common purpose. He did not say that they must be satisfied beyond reasonable doubt that there was a common purpose.

With regard to the first of the above four grounds of appeal it was held in *Rex* v. *Boysie Singh*[2] that "where there is a "retrial and it is desired to prove at the second trial inconsistent "testimony of witnesses at the first trial, it is undesirable for "counsel of a prisoner at the first trial to give evidence of statements made at that trial. The judge's longhand note of the "evidence is the best evidence of such testimony." Section 10 of the Criminal Appeal Ordinance (Laws of Trinidad and Tobago, 1950 Rev., c. 3, No. 2) provides that the judge's longhand note is the official record for the purposes of appeal. In England, when there is a dispute between the judge's note and the shorthand note, the former prevails; and see section 8 of the Criminal Appeal Act, 1907. Rule 5 (*d*) of the Criminal Appeal Rules, 1908 (No. 227 (L.6)), provides that the shorthand writer shall furnish a transcript of the proceedings to a party interested in the trial. Admittedly this case raises a difficult problem as to how this matter should be dealt with in a colony where there are no shorthand notes taken in such a case as this, but it is submitted that the *Boysie Singh* case[2] was a very practical and sensible decision and enabled the best record to be used on a retrial. The exact method of proving the notes is a difficult question, and it is appreciated that it is undesirable to call the judge to prove his own notes.

The cases on which the Court of Criminal Appeal relied are two cases of perjury which, it is submitted, are in a different category: *Reg.* v. *Child*[3] and *Reg.* v. *Morgan*[4]; they also referred to *Reg.* v. *Bird*,[5] but that case has no reference to this matter at all. *Mayor of Doncaster* v. *Day*[6] gives the judge's notes a higher standing than notes of other persons. The headnote in *Griffin's Divorce Bill*[7] is against the appellant here, but that case is relied on as suggesting a method by which the decision in *Boysie Singh's* case[8] could have been worked out. The judge here was wrong to refuse to give a copy of his notes. Whether or not he was under a duty to disclose the notes, he was under a duty to assist the appellant in having a fair trial, and by failure to hand over the note he prevented the appellant from having a fair hearing.

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[2] XI Tr.L.R. 17.
[3] (1851) 5 Cox C.C. 197, 203.
[4] (1852) 6 Cox C.C. 107.
[5] (1851) 5 Cox C.C. 20.
[6] (1810) 3 Taunt. 262.
[7] [1896] A.C. 133.

D. A. Grant for the Crown. Even if there were any material discrepancies in the evidence at the two trials, it will be submitted that there was no miscarriage of justice in this case.

[The hearing of the appeal was then adjourned sine die to enable counsel for the appellant to be furnished with a copy of the judge's note in order to ascertain whether there were in fact any such discrepancies.]

Kellock (on resumption of the appeal). There are no substantial differences in the evidence at the two trials.

One of the grounds of appeal to the Board in *Sambasivam* v. *Public Prosecutor, Federation of Malaya*[9] was that "the said "judge was in error in forbidding, during the course of the "cross-examination of an important prosecution witness, the "appellant's counsel to mention the fact that this was a retrial, "and in thus preventing the veracity of that and other witnesses "being tested by reference to the earlier statements they had "made." It was said by the Board that that ruling of the judge was wrong, but they did not allow the appeal on that ground because it was not the subject of appeal to the Court of Appeal below. That appears to be the only case on such cross-examination as to a witness's credibility. See, also, *Mahadeo* v. *The King*[10]; it is submitted that there is an analogy between the statements of witnesses to the police and the judge's notes. In a murder trial counsel should not be hampered in any possible way. Defence counsel at the second trial should not have been deprived of an opportunity of cross-examining witnesses in extenso on the evidence they had given at the first trial, and, whether or not anything would have arisen out of such cross-examination, the deprivation of that opportunity would make it clear that justice did not appear to be done.

As to the second ground of appeal, it was wrong for the prosecution suddenly to change completely the nature of the case against the appellant at such a late stage, if at all. He was not given an opportunity of knowing the case against him. [Reference was made to *Rex* v. *Treacy*.[11]] In the case of *Adelaide Bartlett*,[12] in 1886, reported only in the Notable Trials Series, the Attorney-General in his final speech produced a new theory of the death, and counsel for the defence protested against any such suggestion being put forward at that stage. Wills J. said[13]: "I do not suppose you will consent to approach this subject "as against the prisoner from any other hypothesis than that "originally put forward, that to which all the medical evidence "was directed. . . ." That appears to be the only case in which anything like this has ever occurred. If the Crown is to put its case on alternative theories it must do so from the beginning. [*General Medical Council* v. *Spackman*[14] was referred to.] An accused person must know the nature of the case he has to meet. This switch of case is not up to the standards that British law requires; and this being a murder trial, it is particularly important that the accused man should not be prejudiced by such a change of case.

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[8] XI Tr.L.R. 17.

[9] [1950] A.C. 458, 470; 66 T.L.R. (Pt. 2) 254.

[10] [1936] 2 All E.R. 813; [1936] W.N. 203.

Lastly, there was here no evidence that two people were participating in the crime and therefore no evidence of aiding and abetting, no evidence of a preconceived plan, and no evidence that the appellant participated in the murder itself. With regard to common intention, see *Mahub Shah* v. *King-Emperor*[15] and *M. J. Fernando* v. *The Queen*.[16] The standard authority on aiding and abetting is *Reg*. v. *Coney*.[17] There has been here a fundamental miscarriage of justice and the appeal should be allowed.

D. A. Grant for the Crown. There are two points in regard to the judge's notes: (1) whether the refusal to counsel for the defence was wrong, and (2) if it was wrong, has it caused a substantial miscarriage of justice? On the second point, counsel for the appellant has said that there was no substantial difference between the notes of the evidence at the first trial and the evidence that was given at the second trial by the prosecution witnesses. If that is right, of course that means that there could have been no cause for complaint on that ground. The first point is whether the judge was bound to grant the application made by counsel for the defence—whether counsel had an absolute right

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[11] [1944] 2 All E.R. 229, 233; 60 T.L.R. 544.

[12] Notable Trials Series.

[13] Ibid. 384.

[14] [1943] A.C. 627; 59 T.L.R. 412; [1943] 2 All E.R. 337.

[15] (1945) L.R. 72 I.A. 148.

[16] (1952) 54 C.N.L.R. 255.

[17] (1882) 8 Q.B.D. 534.

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to be supplied with a copy of the judge's notes in the case of a second trial. There is no rule of law which requires a judge, when a retrial has been ordered, to provide a copy of his notes of the first trial. There is no authority to suggest the contrary. It must be in the discretion of the judge. There was here no wrongful exercise of it.

With regard to the suggestion in cross-examination that the appellant was acting with another person, who was named, this is a case of circumstantial evidence only. The appellant had ample opportunity to commit the crime; there was evidence which the jury could accept as showing that he had a motive—that he was associating on the night of the murder with another woman—and also evidence that he had expressed an intention to rid himself of his wife. The blood on his clothes told strongly against him. There was ample evidence from which the jury could infer, without drawing any inference of exactly how the murder happened, that the appellant was guilty of murder. It was not improper for the prosecution to make the suggestion they did in cross-examination about aiding and abetting; and there was nothing in it to lead to a miscarriage of justice. In his summing-up the judge had strongly warned the jury that they should only find the accused man guilty if they were irresistibly led to the conclusion that he took part in the crime in conjunction with another person. On the evidence in this case the appellant was clearly guilty.

Kellock replied.

April 30. LORD OAKSEY announced that their Lordships would humbly advise Her Majesty that the appeal should be dismissed and that they would give their reasons later.

May 14. The reasons of their Lordships for dismissing the appeal were delivered by LORD KEITH OF AVONHOLM. The appellant was convicted of murder by verdict of a jury after a trial held at the San Fernando Assizes of the Supreme Court of Trinidad and Tobago presided over by Celestain J. The appellant appealed to the Court of Criminal Appeal for Trinidad and Tobago on various grounds. The court dismissed his appeal. The appellant has obtained special leave to appeal in forma pauperis to this Board against the judgment of the Court of Criminal Appeal.

The person of whose murder the appellant was convicted was a young woman named Minwatee Ramlochan, also called Toy, 13 years and four months old at the time of her death, whom the appellant had married by Hindu rites on May 15, 1954. He had, however, a wife at that time from whom he was living separate so that his marriage to Toy was not a legal marriage. Toy met her death on June 12, 1954, within a month of her marriage, in circumstances that will be mentioned later.

The appellant had been previously tried for the murder before Duke J. and a jury in March, 1955, when the jury disagreed. One of the points taken for the appellant in this appeal is that he was prejudiced in his defence at the second trial through his counsel being refused a copy of, or access to, the judge's notes of the first trial. No provision is made by the laws of Trinidad and Tobago for the taking of shorthand notes of the proceedings at the trial of a person on indictment. Section 10 of the Criminal Appeal Ordinance (Ch. 3. No. 2-1940) provides that on appeal against conviction or sentence, or on application for leave to appeal, the trial judge shall furnish to the registrar, in accordance with rules of court, his notes of the trial. It will be convenient to deal with this point now.

Application for a copy of these notes appears to have been made by the appellant's counsel by letter of April 26, 1955 (the terms of which are not before the Board), which was referred by the Chief Justice to Duke J. Intimation was made to counsel by letter from the clerk to the judges dated May 6, 1955, that Duke J. had refused the application. Nothing further was done in the matter until the evidence for the prosecution at the second trial was completed. Appellant's counsel then intimated that he proposed to call the clerk to the judges to prove his signature to the letter of May 6. The trial judge having indicated that this was unnecessary, some further discussion took place on the appellant's right to have the judge's notes, upon the authority of *Rex* v. *Boysie Singh & others.*[1] The discussion concludes with the note: "Court states that it cannot overrule another judge's orders. "Will consult him." The following day the court informed counsel that the judge's notes had been forwarded and were now at the court's disposal. If counsel wished to know what was said by any witness the court would consult the notes and, if it was necessary to contradict the witness, would call the registrar to put them in evidence. Appellant's counsel maintained, however, that he should have a certified copy of the notes, which the court explained was impossible at that stage. Certain of the prosecution witnesses were subsequently recalled at the request of appellant's counsel and certain passages from the judge's notes

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[1] (1950) XI Tr.L.R. 17.

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were put to some of these witnesses without, in their Lordships' view, any material effect on their previous evidence. After these witnesses had left the box appellant's counsel stated that there might be other contradictions in the notes and wished to have the judge's notes to peruse. This application was refused. Their Lordships thought fit, in the course of the hearing of this appeal, to order copies of the judge's notes to be made available to appellant's counsel and to adjourn the hearing to enable counsel to see whether the notes disclosed any material discrepancies in the evidence given by witnesses at the second trial. In the result counsel stated that he had discovered no material discrepancy which had not been put to witnesses at the trial.

On any view their Lordships would accordingly find themselves unable to give any weight to this particular ground of appeal. They consider it desirable, however, to express their opinion on the point raised. No authority has been cited to show that a party is entitled as of right to access to a judge's notes in a previous trial, for use in a subsequent trial, and in their Lordships' opinion no such right exists apart from any statutory provision. In *Rex* v. *Boysie Singh & others*,[1] which was relied on by appellant's counsel, it was held that: "Where there is a "retrial and it is desired to prove at the second trial inconsistent "testimony of witnesses at the first trial it is undesirable for "counsel of a prisoner at the first trial to give evidence of state- "ments made at that trial. The judge's longhand note of the "evidence is the best evidence of such testimony." This, in their Lordships' opinion, is a decision only on what is the best evidence of what was said at a previous trial. It does not follow that a party is entitled to demand production of a judge's notes of the evidence at the first trial for purposes of cross-examination of witnesses at the second trial, though it may be thought convenient, or proper, or desirable, in some cases to make such notes available to the parties. The Court of Criminal Appeal in their judgment took the view that it was contrary to authority to say that a judge's longhand notes of evidence are the best evidence of the testimony given and that on this point the case of *Rex* v. *Boysie Singh & others*[1] should be overruled. Their Lordships would reserve judgment on this point, which it is not necessary to decide for the purposes of this appeal.

Before proceeding to consider the other points taken for the appellant before the Board their Lordships would now state some of the facts disclosed by the evidence in the case, and more particularly those bearing on grounds of appeal taken by appellant's counsel. The murder disclosed some puzzling features on which no light could be thrown by the evidence. The body was found by the witness Baboonie about 7.30 a.m. on June 12 at the foot of an immortelle tree some 284 feet from the appellant's house. The head was completely severed from the body and lay close to the body. The body was clothed in a dress and slip and the hair was neatly tied in a cloth at the back of the head. The feet were bare and there was dough on the palms of the hands and on the back of the fingers below the knuckles. There was a chop or cut, in the root of the tree, in which there appeared to be some bloodstains. There was very little blood at the spot where the body was lying, four or five tablespoonsful at the most, and only a little blood on the clothing near the neck. The body and organs were drained of blood and it was clear that the girl could not have been murdered at the point at which the body lay. No place appears to have been found at which the murder could have been committed. The medical evidence was that the head had been severed from the body by one blow delivered from behind by a sharp heavy cutting weapon, such as a cutlass.

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[1] XI Tr.L.R. 17.

The dead girl was last seen alive by the witnesses Pherangie and his wife Baboonie in their house about 8 o'clock of the evening of June 11. Their house and the appellant's house were in the same yard some 50 feet apart. The witnesses were related to the appellant, who was the grandson of Baboonie's sister, though he generally called her Aggie, which means grandmother. Toy was regularly in and out of Baboonie's house and invariably so after the appellant left for his work in the mornings about 6 o'clock. There had been some talk that evening of the appellant leaving Toy alone in his house that night and of going himself to a party, but Pherangie thought he had persuaded him to stay at home with Toy.

Next morning the appellant came into Pherangie's house on his way to his work about 6 a.m., ate some fruit and then left. Baboonie asked him where Toy was and he said: "She is there "home." About 6.20 Toy's father stopped at the appellant's house, called out his daughter's name, got no reply and proceeded on his way. Baboonie was with him at the time. Baboonie had missed Toy that morning. She had seen no sign of her from her house, nor had Toy come across to see her, as was her custom. After Toy's father had gone she entered and searched round Toy's home and found no trace of her until she found the body by the immortelle tree.

The day after the murder the appellant made a statement to the police giving, inter alia, details of various household duties which he said Toy had performed for him before he left for his work on the morning of June 12, and concluding with the sentence, "When I left home at 6 o'clock my wife was alive in "the kitchen." He said so also in his evidence. The appellant has throughout and in his evidence at the trial maintained that he did not leave his house that night. There was, however, evidence laid before the jury that he had been seen on three separate occasions in the middle of the night some distance from his house. The witness, Boodram, who had patrol duties to perform during the night in connexion with his employment, said he saw the appellant about 2 a.m. with a girl Sookdayah going up a track leading to the house of the girl's father, Sukdeo. Later that night he saw the appellant and Sukdeo walking in the direction of the appellant's house and Sukdeo had a cutlass in his hand. Another witness, Abdool Rahaman, said he was out hunting manicou that night with three dogs, a lance and a headlight when he met the appellant with a torchlight, and a cutlass in his hand. The time, he says, was 3.30 to 4 o'clock. The appellant, he says, told him he was hunting too. To the court he said: "Accused only had a cutlass, no gun or dogs. One "cannot hunt with a cutlass alone."

The medical evidence was to the effect that the girl must have been killed between 4 a.m. and 7 a.m.

The only other evidence which it is material to notice for the purposes of this appeal relates to certain garments belonging to or said to belong to the appellant. These were two pairs of khaki trousers and a grey shirt. One pair of trousers was found hanging damp on a line in the appellant's house when the house was searched by the police on the day of the murder. The other pair was in the possession of the appellant when he was found by the police at his place of work on the morning of the murder. The grey shirt was being worn by the appellant when he was interviewed by the police the same morning. The trousers found in the house had some blood stains on the right-hand pocket and leg. The other pair of trousers had a blood stain on the lower part of the right leg. The shirt had a number of blood spots on the back. These were all found by analysis to be human blood of group O. This is one of the two commonest blood groups and was the blood group of the appellant and of the dead girl. The accused denied knowledge of the trousers found in his house hanging on a line. He also denied that he was wearing the grey shirt at all that night. His evidence was that he left the house in khaki trousers and a white shirt and changed into working clothes consisting of grey flannel trousers and the grey shirt which he said he kept in the truck of his employer at the place where he worked. At the trial he accounted for the stains on the back of the grey shirt through suffering from eczema, but the doctor who examined his body at the police station on the day of the murder saw no source of bleeding and no signs of eczema. No signs of blood were found on any other garments of the accused or in scrapings of his finger nails or washings of various parts of his body.

Some evidence was led on whether he had a white shirt at all with him that morning. The police evidence was that he had not and that when they took the grey shirt from him they supplied him with a white shirt to take its place. In the statement made to the police at the time the appellant said nothing about a white shirt, although he referred to the khaki trousers. The relevant passage is: " When I take up work I change the pants I leave " home in, that was a long khaki pants, I put on an old pants " which I had in the truck on which I works, and the truck pulls " out."

Their Lordships now come to the second ground of appeal, which is that in cross-examination of the accused certain improper and prejudicial questions were put to him which represented a complete change of front in the case hitherto taken by the prosecution and which were taken up later by the judge and made matter for consideration by the jury. The relevant extract of this cross-examination from the judge's notes of the trial is as follows:

" My plan was not to leave her in this house alone and go to " Ramlal's house where there would be several people who could " say Ramsook was there and I and my partner would sneak out " from the dinner come back and kill my wife in that house and " then return to Ramlal's house. I had no plan at all so " Baboonie and Pherangie could not spoil my plan. I did not " leave them (Baboonie and Pherangie) and go home at 8. We " went to sleep. I never left the house. I did not sneak out " whilst my wife was sleeping and that is how I was seen with " Sookdeo at 2.30 a.m. I was home sleeping. I did not re" arrange any plan because I had no plan. My partner and I " did not arrange a point in the bushes where my wife was to be " killed. I had no partner. I did not arrange to get her to leave "the house, follow me to this track. I do not go home sneak "into my house.

"Seunarine states there is no evidence to support these "suggestions of the Crown.

"Court rules there is some evidence from which the jury may "or may not find the inferences the only logical conclusions to "which they should come. The evidence is circumstantial and "it will be for the jury to say whether or not the suggestions are "warranted by their findings.

"Continuing: I did not wake my wife and tell her I was going "to the dinner. I did not induce my wife to follow me. I did "not have on two pairs of khaki trousers. I only have one pair.

"Question: You walked as if in the direction of Ramlal's "house and as you come to the point to where your partner was "armed with a cutlass?

"Answer: I know nothing about that. My wife woke me to "go to work.

"Question: As you got past that point and before your wife "knew what was happening her head was off.

"Answer: I know nothing about that. I was home sleeping.

"Question: You were at that time wearing that grey shirt?

"Answer: That grey shirt stops in the truck all the time.

"Question: As the man swung the cutlass blood from the "cutlass or from the body of your wife spattered your shirt?

"Answer: I knows nothing about that. I was home sleeping.

"Question: You and your partner remained there until all "the blood drained out of the body?

"Answer: I knows nothing about that. I have no partner.

. . . . . .

"Question: I suggest Sookdeo was the partner?

"Answer: I had no partner at all."

The summing up by the judge includes the following passages: "The Crown is relying entirely on circumstantial evidence, "circumstantial or indirect evidence. There is no direct evidence "that the accused or anyone else committed the act which "resulted in the death of Minwatee on the 12th of June; there "is no direct evidence on that at all.

. . . . . .

"Now gentlemen, if you are satisfied that the evidence given "by the prosecution is reliable and trustworthy, having regard "to all the other evidence in the case, then and only then may "you proceed to the next step in dealing with this circumstantial "evidence; namely, that you are satisfied beyond reasonable

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"doubt that you have drawn the correct inference from the facts "before you, and then that they prove the case for the Crown "with the accuracy of mathematics; in other words, that you "are irresistibly impelled to one conclusion and one conclusion "only and that is, that the accused murdered the girl Minwatee. "If that is so, then you will convict him—it matters not if there "were other persons with him; if each took part in the furtherance of a common criminal purpose, in encompassing the death "of that woman and one of them struck the fatal blow, even if "it was not he, the accused, he would nevertheless be guilty of "murder. That is the position.

"He need not necessarily have struck the . . . blow himself; "if you are satisfied beyond reasonable doubt that he was the "person aiding and abetting some other person or persons to do "this act, with full knowledge, then he would be equally guilty "as the others—quite independently of the others. If, however, "you feel doubtful or hesitant in your mind that that is the only "reasonable conclusion to which you could come, then gentlemen "you should acquit. For mere suspicion is not enough to "warrant a conviction. That gentlemen, is the law as I understand it, on which I have just tried to make myself clear and "by which you should be guided in dealing with this evidence "which has come before you.

. . . . . .

"Now gentlemen, if you think that the only reasonable conclusion that you can come to is that there was some other "person who was concerned in this crime, it does not matter "who the other person is, as far as you are concerned. You are "not concerned with trying any other person except the man in "the dock and you must not strain to find or come to any conclusion adverse to him; you must feel entirely impelled to any "conclusion that you may come to—you must feel reasonably "safe that that is the only conclusion that reasonable men would "come to.

"Then if you conclude that there were two persons concerned, "the theory of the Crown becomes possible: that the blood stains "were caused on the back of the shirt of the accused by blood "from the same cutlass that was swung with a sweep. The "doctor found that it was one wound, one cut; and that the "cutting must have started from behind. And the Crown's "suggestion is that they were walking in Indian file and she "behind him and that another person acting in concert with him

" gave one wound, one cut and that the sweep of that cutlass " threw spots of blood on the back of the accused.

" Now it becomes very important both to the Crown and to " the defence whether the accused had that shirt on his back on " the 12th June, 1954, at Standard Road—very important to both " sides. That is one of the big issues in this case joined between " the Crown and the accused. The accused says that that shirt " is his working shirt . . . 'I did not have that shirt on until I " 'reached Palo Seco where I work; it always remains there; " 'for two months that shirt did not reach home—has not been " 'home.' Well, if that was so, even if it got blood stains it " could not possibly be connected with this case; it must have " been somewhere other than in the vicinity of Standard Road " or elsewhere from where this crime was committed. If it was " in the truck at Palo Seco, two miles away, it could not possibly " have anything to do with this case and so it is of paramount " importance that you should make your decision one way or the " other and if you are in doubt, you will resolve it in the favour " of the accused.

. . . . . .

" If there was more than one person concerned and he killed " her with the help of another, you might find then that there is " another person who might have a motive; you must remember " that the Crown is not saying that he actually did the act, the " whole attitude is that someone else did the act but he was " equally guilty because he was present aiding and abetting; it " was with his knowledge and sanction; he normally may have " been content, but this other person concerned might have " wished her death."

Their Lordships are unable to take the view that there was any illegitimate or improper exercise of counsel's right and duty to cross-examine the accused. The Crown case was that the accused had murdered this girl. How and in what circumstances the fatal blow was struck was one of the mysteries of the case. Whether or no the accused, if he carried out the murder, was assisted by someone else was another unknown feature in the case. Whether the accused himself struck off the girl's head or was a party to someone else doing so was immaterial. In either case he was guilty of murder. It was open to the jury to take either view on the circumstantial evidence in the case and they may well have thought that the evidence pointed more to the accused having the assistance of someone else, particularly the fact that the body and the head must have been transported from the place where the murder was committed to the place where the body and head were found. It was suggested by counsel for the appellant that he might have been present at the time of the murder without having intentionally facilitated it and been no more than an accessory after the fact. But in the circumstances of this case this suggestion is, in their Lordships' opinion, too incredible to be worthy of serious consideration. Nor are their Lordships able to see that there was any change of front in the conduct of the case by the prosecution. The Crown was not bound to state its theories in advance. These theories were inferences from evidence which it may be assumed Crown counsel explained to the jury in opening that he was about to lead. Their Lordships are unable to extract from the evidence led for the prosecution that the Crown had tied itself to any view of how the murder was committed. In cross-examination counsel was, however, in their Lordships' view, bound to put to the accused any inferences from the evidence which he proposed to put before the jury. So also in his summing up the judge was entitled to state to the jury the alternative inferences which might be drawn from the evidence as to the manner of the murder. It is true that no other person was indicted along with the accused for the murder. But that may have been because, whatever suspicions there were, there were no incriminating circumstances attaching to any other person sufficient in the opinion of the Crown to justify it in bringing against any other person an accusation of murder. There were many incriminating circumstances attaching to the appellant which were all before the jury, including some to which their Lordships have not found it necessary to refer. The evidence was very fully placed before the jury by the judge in his summing up. On the evidence it was open to the jury, in their Lordships' opinion, to take the view that the accused committed this deed alone or that he committed it with the assistance of some other person. The trial judge did not, in their Lordships' view, exclude the first alternative though he may have stressed the view that the evidence might be taken to indicate that the murder was committed by more than one person. But that is not, in their Lordships' opinion, fatal to a conviction because it was a view open to the jury to take on the evidence.

Counsel for the appellant took a further objection that the trial judge in dealing with the evidence failed to direct the jury that they must be satisfied not only that the accused was present but that there was evidence that he was present aiding and abetting the commission of the crime. In their Lordships' view there was an adequate direction given on aiding and abetting in the passages in the summing up which have been already quoted. In the circumstances of this case and on the whole evidence led it would, as their Lordships have already indicated, have been impossible to hold that if the accused was present at the murder he was not at least aiding and abetting.

For the reasons given their Lordships have humbly advised Her Majesty that the appeal should be dismissed.

Solicitors: *T. L. Wilson & Co.; Charles Russell & Co.*

C. C.

[HOUSE OF LORDS.]

SANDERSON AND OTHERS . . . . . APPELLANTS;

AND

INLAND REVENUE COMMISSIONERS . RESPONDENTS.

H. L. (E.)*
1955
Nov. 22;
Dec. 19.

Revenue — Estate duty — Valuation — Shares — "Property deemed to "pass"—Shares in company controlled by deceased—Disposition within three years of death—Method of valuation—Finance Act, 1894 (57 *&* 58 *Vict. c.* 30), *ss.* 1, 2, 7 (5)—*Finance Act,* 1940 (3 *&* 4 *Geo.* 6, *c.* 29), *s.* 55.

By section 55 (1) of the Finance Act, 1940: "Where for the "purposes of estate duty there pass, on the death of a person dying "after the commencement of this Act, shares in . . . a company "to which this section applies, then if—" in certain conditions which were admittedly satisfied in the present case, "the principal "value of the shares . . . in lieu of being estimated in accordance "with the provisions of subsection (5) of section 7 of the Finance "Act, 1894, shall be estimated by reference to the net value of the "assets of the company . . ."

A settlor, who died in 1943, had voluntarily settled in 1942 on trust for his son and daughter shares in a private company in which he held a controlling interest. It was admitted that on his death estate duty in respect of these shares was payable under section 2 (1) (*c*) of the Act of 1894:—

Held that, on its true construction, section 55 (1) of the Act of 1940 was simply a valuation section, a rider to section 7 (5) of the Act of 1894, applying equally to property which "passes on the

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* *Present:* LORD MORTON OF HENRYTON, LORD PORTER, LORD RADCLIFFE, LORD TUCKER and LORD COHEN.

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"death" within section 1 of that Act and property which is "deemed" by section 2 to be "included" in property passing on the death, and that accordingly it applied to the shares in question.

Earl Cowley v. *Inland Revenue Commissioners* [1899] A.C. 198; 15 T.L.R. 270 and *Attorney-General* v. *Milne* [1914] A.C. 765; 30 T.L.R. 476 considered.

Decision of the Court of Appeal (sub nom. *In re Hall's Settlement. Sanderson* v. *Inland Revenue Commissioners*) [1955] Ch. 128; [1954] 3 All E.R. 435 affirmed.

APPEAL from the Court of Appeal (Jenkins, Romer and Parker L.JJ.).

This was an appeal from an order dated October 28, 1954, of the Court of Appeal, affirming an order of the Chancery Division (Upjohn J.) made on June 30, 1954. The last-mentioned order was made in proceedings commenced by originating summons issued by the appellants, Harry Herbert Sanderson, Harold Arthur Hall, Charles Maxwell Strachan and Kenneth Patrick Helm, under the Administration of Justice (Miscellaneous Provisions) Act, 1933, for the determination of the question whether on the true construction of the Finance Act, 1894, and amending Acts, and in the events which had happened, the principal value of 400 shares in Thomas Hamling & Co. Ltd., a private company (hereinafter called "the company"), comprised in a settlement made on July 27, 1942, by the late Harold Hall (hereinafter called "the deceased") within three years of his death on December 30, 1943, and thereby settled on trusts for the benefit of his son and daughter, fell to be estimated in accordance with the provisions of section 5 (7) of the Finance Act, 1894, or by reference to the net value of the assets of the company in accordance with section 55 (1) of the Finance Act, 1940. The first three appellants were the trustees of the settlement and the first, third and fourth appellants were the legal personal representatives of the deceased. The question for determination was whether, on its true construction, section 55 of the Finance Act, 1940, which was introduced by the words: "Where for the purposes of estate "duty there pass, on the death of a person dying after the "commencement of this Act, shares in or debentures of a com-"pany to which this section applies," and which laid down a particular method of valuing the shares in or debentures of a company to which the section applied, was applicable to shares and debentures which were by the effect of section 2 (1) of the Finance Act, 1894, "deemed" to be included in the property passing on the death of a deceased person, or whether the former section was confined in its operation to shares or debentures which actually passed on his death within the meaning of section 1 of the Act of 1894.

C. R. Russell Q.C., *F. N. Bucher Q.C.* and *J. A. Armstrong* for the appellants. The questions to be determined are: (1) Is it right to treat section 55 of the Finance Act, 1940, on the same lines as other sections of the Act which are of general application? (2) If not, is the ordinary meaning of the words "pass, on the "death" affected by the introduction of the words "for the "purposes of estate duty"?

Section 2 (1) (*c*) of the Finance Act, 1894, refers to section 38 (2) of the Customs and Inland Revenue Act, 1881. The subject-matter of section 2 of the Act of 1894 is outside the conception of a passing on death. The words "where . . . there "pass, on the death" in section 55 (1) of the Act of 1940 cannot refer to shares which cannot pass on death, but section 2 of the Act of 1894 assumes that inter vivos gifts are not within those words. If one assumes that there must be some reason in section 2 for a departure from the ordinary meaning of "passing "on the death," the plain meaning of "pass, on the death" is still not altered, and in that meaning these shares do not pass. It would have been simple for the draftsman, if he meant to cover this kind of case, to put into section 55 (1) some such words as "pass or are deemed to pass," a phrase used in other Finance Acts, e.g., Finance Act, 1900, s. 12 (2), and Finance (1909–1910) Act, 1910, s. 57; he would not have worded it as he did. The words "for the purposes of estate duty" in section 55 (1) echo the same words in section 37 (1) of the Finance Act, 1930 (the relevant Part of which is to be construed as one with the Act of 1894: section 53 (3)), which is repealed and replaced by section 55. They should not be enlarged, for the change in their position was not meant to bring about a change so as to cover gifts inter vivos. If the draftsman had been instructed to bring in "deemed" cases he would not have done it in this way. An enlarged meaning of the word "pass" in section 55 is not justified by a consideration of the purpose of the section. Contrast section 55 with section 46, where the use of the expression "for the purposes of estate duty" shows that it cannot in section 55 have the meaning attributed to it by the Court of Appeal. Without that expression the words "pass, on the "death" would not apply to these shares and its presence should not have the effect of bringing them within the section. The phrase may have been indicating the general subject of discussion or ensuring that the definition section was brought in, but it was not meant to widen the phrase "pass, on the death" and cannot have a legislative effect. In the absence of some special context in the section, "pass, on the death" must have its normal and natural meaning, and there is no such context. One starts with the overriding proposition that "pass, on the death" has prima facie its natural meaning, that it should be construed literally and that it is for the Crown to establish another meaning. It is true that in the Finance Acts in sections of general application the phrase would generally include property deemed to pass by virtue of section 2 of the Act of 1894, but section 55 is not a general section and, although a valuation section, it is not a mere valuation section; it imposes a new and distinct liability, a supercharge of estate duty: see *per* Upjohn J. in this case.[1] *Attorney-General* v. *Milne*,[2] which refers to *Earl Cowley* v. *Inland Revenue Commissioners*,[3] is relied on, although it is accepted that it does not cover the present case, as the statutory language was different, but it is to some extent a parallel case. Section 43 of the Act of 1940 cuts both ways equally.

B. L. Bathurst Q.C. and *E. B. Stamp*, for the respondents, were not called on to argue.

Their Lordships took time for consideration.

1955. Dec. 19. LORD MORTON OF HENRYTON. My Lords, Harold Hall died on December 30, 1943. By a settlement dated July 27, 1942, he had settled 400 shares in a private company named Thomas Hamling & Co. Ltd. upon trusts for the benefit of his son and daughter.

It is admitted by the appellants that estate duty became payable on the death of the settlor in respect of these shares, under section 2 (1) (*c*) of the Finance Act, 1894, and the only question arising on this appeal is whether these shares should be valued, for the purposes of estate duty, in the manner prescribed by section 55 (1) of the Finance Act, 1940, or in the manner prescribed by section 7 (5) of the Finance Act, 1894. Upjohn J. and the Court of Appeal took the view that the former section applied to the present case.

The statutory provisions which are directly relevant to the issue are as follows: Finance Act, 1894, section 1: "In the case

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[1] [1954] 1 W.L.R. 1185, 1187; [1954] 2 All E.R. 679.

[2] [1914] A.C. 765; 30 T.L.R. 476.

[3] [1899] A.C. 198; 15 T.L.R. 270.

"of every person dying after the commencement of this Part of "this Act, there shall, save as hereinafter expressly provided, "be levied and paid, upon the principal value ascertained as "hereinafter provided of all property, real or personal, settled "or not settled, which passes on the death of such a person a "duty, called 'estate duty,' at the graduated rates hereinafter "mentioned, and the existing duties mentioned in Schedule I to "this Act shall not be levied in respect of property chargeable "with such estate duty." Section 2 (1): "Property passing on "the death of the deceased shall be deemed to include the property following, that is to say:—. . . (c) Property which would "be required on the death of the deceased to be included in an "account under section 38 of the Customs and Inland Revenue "Act, 1881, as amended by section 11 of the Customs and "Inland Revenue Act, 1889, if those sections were herein enacted "and extended to real property as well as personal property, "and the words 'voluntary' and 'voluntarily' and a reference "to a 'volunteer' were omitted therefrom. . . ." Section 7 (5): "The principal value of any property shall be estimated to be "the price which, in the opinion of the Commissioners, such "property would fetch if sold in the open market at the time of "the death of the deceased; . . ."

Finance Act, 1940, section 55 (1): "Where for the purposes of "estate duty there pass, on the death of a person dying after the "commencement of this Act, shares in or debentures of a company to which this section applies, then if—. . ." (here follow certain conditions which were admittedly satisfied in the present case, and the section proceeds): "the principal value of the "shares or debentures, in lieu of being estimated in accordance "with the provisions of subsection (5) of section 7 of the Finance "Act, 1894, shall be estimated by reference to the net value of "the assets of the company in accordance with the provisions of "the next succeeding subsection." The next succeeding subsection contains provisions for ascertaining the "net value of the "assets of the company" and is not material for the present purpose. Section 65 (5) provides that: "Part IV of this Act "shall be construed as one with Part I of the Finance Act, "1894." The result is that section 55 of the Act of 1940 is to be construed as one with section 7 of the Act of 1894.

It appears that in the present case a valuation under section 55 (1) of the Act of 1940 would result in a much higher figure than a valuation under section 7 (5) of the Act of 1894, and it is suggested, on behalf of the appellants, that this will be so in every case. The first three appellants are the trustees of the settlement of 1942, and the first, third and fourth appellants are the legal personal representatives of the settlor, Harold Hall. The legal personal representatives are interested parties because the 400 shares have to be aggregated, for the purposes of estate duty, with the settlor's free estate, and a higher value put upon the 400 shares would or might increase the rate of estate duty payable upon the free estate.

The question for decision turns upon the opening words of section 55 of the Act of 1940: "Where for the purposes of "estate duty there pass, on the death of a person . . . "shares . . .". Mr. Russell, for the appellants, contended that the 400 shares did not pass on the death of the settlor, in the ordinary meaning of the word "pass"; secondly, that in this statute, in the absence of the words "for the purposes of "estate duty" the words "pass, on the death" would not apply to the 400 shares; and thirdly, that the words "for the purposes "of estate duty" did not have the effect of bringing the shares within the section.

My Lords, I accept Mr. Russell's first proposition. The shares passed to the trustees on the execution of the settlement of 1942, and there was no further passing, in the ordinary sense of the word, on the death of the settlor.

As to his second proposition, he concedes that in the Finance Acts, in the case of sections of general application, the words "pass on the death" are generally construed to include property which is deemed to pass by virtue of section 2 of the Finance Act, 1894. He submits, however, that section 55 of the Act of 1940 is not a mere valuation section, but imposes a "super-"charge" of estate duty by greatly increasing the sum which will be payable in the special circumstances mentioned in the section. He relies upon the case of *Attorney-General* v. *Milne* [1] as being in some degree a parallel case. My Lords, the question whether the 400 shares would have been caught by section 55 if the words "for the purposes of estate duty" had been absent does not arise for decision, but as the nature of section 55 was discussed in the judgments below, I think it right to say that, in my view, it is simply a valuation section. It lays down that certain property in respect whereof estate duty is payable under the existing law shall be valued in a particular way, and it does not bring any new species of property within the charge of estate duty. For this reason the case of *Attorney-General* v. *Milne* [1] is of no assistance to the appellants. Moreover, as section 55 is to be "construed as one" with section 7 of the Act of 1894, it is in substance merely a "rider" or proviso to the general rule laid down in section 7 (5) as to the manner in which the value of "property" is to be estimated; and it was rightly conceded by Mr. Russell that the word "property" in section 7 (5) of the Act of 1894 includes both property which actually passes and property which is deemed to pass.

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[1] [1914] A.C. 765; 30 T.L.R. 476.

Finally, to my mind, the words "for the purposes of estate "duty" remove any doubt which might otherwise have existed, and make it clear that the section applies equally to property which "passes on the death" within section 1 of the Finance Act, 1894, and to property which is "deemed," by section 2 of the same Act, to be "included" in property passing on the death. Each type of property is, in my view, properly described as property which, *for the purposes of estate duty*, passes on the death. Further, I can see no good reason why the legislature should have wished the section to apply only to the former type of property, and I think it likely that the relevant words were inserted for the purpose of making it clear that both types of property were included.

I would dismiss the appeal.

My Lords, my noble and learned friend, Lord Tucker, who is unable to be present this morning, has asked me to say that he agrees with my view that the appeal should be dismissed.

LORD PORTER. My Lords, I concur.

LORD RADCLIFFE. My Lords, I do not feel any doubt that this appeal ought to be dismissed.

The proposition which the appellants invite your Lordships to affirm is that the valuation rules which section 55 (1) of the Finance Act, 1940, requires to be applied to certain estate duty assessments are not to be used where the property in question "passes" by virtue of section 2 of the Finance Act, 1894, and would not have "passed" had section 1 of that Act been enacted without the supplement of section 2. The opening words of section 55 (1) "Where for the purposes of estate duty there pass, "on the death of a person dying after the commencement of "this Act . . ." are said to cover only cases of what is called "actual passing" or "passing in the natural sense of the word," and not to cover what is called "notional passing." In my view, this proposition is unmaintainable. My sole reason for saying something more than is said in the judgment of Jenkins L.J. in the Court of Appeal is that I think that the reason for rejecting it is more soundly based on the general relation of section 55 of the Finance Act, 1940, to the estate duty system inaugurated by the Finance Act, 1894 (of which system this section is to be treated as a part) than upon any special significance to be attributed to the use of the words "for the purposes of estate "duty" at the beginning of that section 55.

Estate duty is not charged by the Act upon two different kinds or classes of property, property which passes in the natural sense and property which is deemed to pass by virtue of special statutory provision. Strictly speaking, as has often been pointed out, no property at all is "deemed to pass" under the Act. What section 1 provides is that estate duty is to be charged upon all property passing on death, whether real or personal, settled or not settled. It offers no other clue as to the meaning to be attached to those words. What section 2 provides is that property passing on death is to be deemed to include certain kinds of property or, perhaps more accurately, certain property in certain situations, and is not to be deemed to include certain property in other situations. I have never known it disputed that the exclusion provision which is contained in section 2 (3) applies to all property passing, whether it passes under section 1 simpliciter or under section 1 so enlarged or interpreted by section 2 (1). But the result of this is that it is section 1 and no other section that imposes the charge of estate duty, that the charge so imposed is imposed upon property that passes on death and no other property, and that the effect of section 2 (1) is to give to the word "passes" in section 1 a meaning wider and, if you please, less natural than it would have had if section 2 (1) had not been enacted. Personally, I find this approach to the general purport of the Act a more satisfactory method than that of dividing the property charged by the Act into two categories consisting in the one case of property actually passing and in the other of property notionally passing, categories which the Act itself does not employ. After all, it is worth while to remember that the word "pass" was not a word of art when the 1894 Act was introduced. Casual uses of it can be found in one or two places in the Succession Duty Act, 1853, and the Customs and Inland Revenue Act, 1881, but, generally speaking, it is true to say that the makers of the 1894 Act were free to give as wide or as limited a meaning to the word "pass" as the scheme of their Act required. And since Acts are passed, and even drafted, as a whole and not in successive stages of time, it is reasonable to suppose that the makers of the Act did not draw up section 1 without knowing what was contained or to be contained in section 2, and for that matter in section 22 (1) (*l*). Consequently it seems a somewhat barren inquiry to ask what meaning would have been attributable to the word "passes" in section 1 if that section had stood, as it did not, by itself or isolated from one or more of the various other sections that make up the context of the Act.

All this leads me to regard with some scepticism any argument that is founded on the supposition of some essential difference between property which actually or naturally passes and property which passes notionally.

For I think it clear that, with one exception, the makers of the Act attached no weight to such a distinction. Once sections 1 and 2, aided by section 22, had established what was meant by "passing" for the purposes of the Act, the rest of the Act, e.g., section 3 (exception for transactions for money consideration), section 4 (aggregation), section 5 (settled property), section 6 (collection and recovery of duty), section 7 (value of property), section 8 (supplementary provisions), refers exclusively to property that "passes" or property "passing", and I can trace no reference to any separate category of property styled property that is "deemed to pass." Yet, except for the provisions as to settlement estate duty contained in section 5, upon which special considerations have been brought to bear, it seems indisputable that these sections are dealing with property which passes by virtue of section 2 (1) as well as property which would have been held in any event to pass even if section 1 had stood alone.

One of these sections which recognize no such distinction is section 7, and subsection (5) of that section prescribes the method of estimating "the principal value of any property" for the purposes of estate duty valuation. Again, it is not disputed that the provisions of that subsection are applicable to property which passes by virtue of section 2 (1) (*c*) and not otherwise. Yet, if that is so, I cannot see what is left of the appellants' argument: for section 55 of the Finance Act, 1940, as its own contents show, merely substitutes another method of estimating value for purposes of estate duty, which method, if the prescribed conditions are satisfied, is to be used instead of the general method laid down in the original section 7 (5). If section 7 (5) applies to property which passes by virtue of section 2 (1) (*c*), it seems to me inescapable that section 55 of the later Act, which takes its place in certain cases, should also apply to property so passing.

I have not forgotten, of course, that in *Attorney-General* v. *Milne* [2] this House decided that the word "passes" in section 5 (1) did not extend to a passing of property which a deceased had settled during his life but within the statutory period, and which therefore fell within the provisions of section 2 (1) (*c*), and that consequently settlement estate duty was not exigible upon the deceased's death. But the present case does not raise that point in any form. We are dealing here with a valuation section, alternative to section 7 (5), not with a section which imposed an additional and supplementary duty in exchange for a resulting exemption. Secondly, section 5 was so drawn that, quite apart from any special significance in the word "passes," it was incapable of applying to a settlement made inter vivos on a living life tenant, which was the case in point; and this circumstance weighed as much as anything else with the members of the House who formed the majority (see, for instance, the speeches of Lord Atkinson and Lord Parker). And, lastly, a dismissal of the present appeal would do nothing to support the view which has been decisively rejected by this House, both in the *Milne* decision,[2] supra, and in *Earl Cowley* v. *Inland Revenue Commissioners*,[3] that section 2 is to be regarded as a "definition "section." Plainly, if I may say so, it is not.

I do not see that our decision can be said in any way to conflict with those earlier cases. The most that can be said in that connexion is that it will leave unexplained what exactly Lord Macnaghten meant in *Cowley* [4] when he said of sections 1 and 2 "the two sections are mutually exclusive," or what Lord Haldane meant in *Milne* [5] by the words: "Section 2 is thus "not a definition section, but an independent section operating outside the field of section 1." But, as Lord Macnaghten's words have been a matter of inquiry since the year 1900 (see *Attorney-General* v. *Dobree*,[6] *per* Channell J.), and since Lord Haldane himself gave a substantially different explanation of the relation of the two sections in *Nevill* v. *Inland Revenue Commissioners*,[7] when he said: "The principle is contained in section 1. "Section 2 combines definitions of such property with the exten- "sion of the application of the principle laid down in section 1

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[2] [1914] A.C. 765.

[3] [1899] A.C. 198; 15 T.L.R. 270.

[4] [1899] A.C. 198, 212.

[5] [1914] A.C. 765, 769.

[6] [1900] 1 Q.B. 442, 450; 16 T.L.R. 80.

[7] [1924] A.C. 385, 389; 40 T.L.R. 341.

"to certain cases which are not in reality cases of changing "hands on death at all . . .", I think that we may safely resign these passages to the list of the many minor mysteries of the law.

LORD COHEN. My Lords, I have had the opportunity of reading in print the speech delivered by the noble and learned Lord, Lord Morton of Henryton, and agree with him that the appeal should be dismissed, for the reasons he has given.

Appeal dismissed.

Solicitors: *Peacock & Goddard; Solicitor of Inland Revenue.*

F. C

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April 23.

MARY VANDERPUYE AND OTHERS . . . APPELLANTS;

AND

MARY AKUA BOTCHWAY . . . . RESPONDENT.

ON APPEAL FROM THE WEST AFRICAN COURT OF APPEAL.

West Africa (Gold Coast)—Jurisdiction—"Land cause"—Suit by children of "six-cloth" marriages—For determination of share in, and distribution of, estate of deceased father—Ga native customary law—"Succession" the real issue—Not a "land cause "or matter"—No jurisdiction in Land Court to entertain appeal from decision of Native Court B—Native Courts (Colony) Ordinance, 1945 (*Laws of the Gold Coast,* 1951, *c.* 98), *ss.* 13, 46.

A suit brought by the appellants, who were children by six-cloth marriages of the deceased, in a Native Court B for the determination of their share in the estate of the deceased according to Ga native customary law and for the distribution of the estate was a "succession case" and not a "land cause" relating to the ownership, possession or occupation of land. Accordingly, the Land Court, to which under section 46 of the Native Courts (Colony) Ordinance, 1945, appeal lies in a land cause from a decision of a Native Court of grade B, C or D, had no jurisdiction to entertain an appeal from the Native Court B's decision in favour of the appellants.

George Hagan v. *Effuah Adum* (1939) 5 W.A.C.A. 35 applied.

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* *Present*: LORD OAKSEY, LORD TUCKER, LORD COHEN, LORD KEITH OF AVONHOLM and MR. L. M. D. DE SILVA.

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To determine into which category—succession case or land cause—a particular suit fell, the court must apply the test of what was the real issue between the parties and not look only at the wording of the plaint.

Archie Kwow v. *Ohene Essien Eku II* (1934) 2 W.A.C.A. 180 approved.

Judgment of the West African Court of Appeal set aside.

APPEAL (No. 27 of 1952) from a judgment of the West African Court of Appeal (March 8, 1951) which dismissed the present appellants' appeal from a judgment of the Supreme Court of the Gold Coast (September 29, 1948) which had allowed an appeal by Joel Douglas Kwaku Botchway, the original defendant, from a judgment of the Native Court B of Ga (November 25, 1947).

The following facts are taken from the judgment of the Judicial Committee: The appellants were 17 of the children by "six-cloth" marriages of Jacob Vanderpuye, deceased, who died on October 5, 1918. On June 28, 1947, they commenced proceedings in Ga Native Court "B," Eastern Province, Gold Coast Colony, against Joel Douglas Kwaku Botchway, who was a first cousin in the matrilineal line of the deceased and had been appointed head of the family of the deceased pursuant to Ga native customary law. The appellants claimed the following relief: (a) A declaration of the share (gbena) to which they were entitled and the appropriation to them of such of the estate as represented the share to which they were entitled according to Ga native customary law. (b) An account of all rents and profits as had accrued to the estate since June 1935, and the payment to the appellants of such amounts as represented their share of the estate which might be found due.

On November 25, 1947, the Native Court delivered judgment in which it was declared that the interest of the six-cloth children of the deceased was the whole estate, but it was ordered that for the reasons stated in the judgment Mr. Botchway and his sister, the present respondent, should be permitted to occupy one room each in the Garden House, one of the properties forming part of the estate of the deceased, and that one-third of the rents accrued in the hands of the receiver and manager of the estate at the date of the judgment, after deducting outgoings, should be given to Mr. Botchway and the respondent. The court directed Mr. Botchway to file an account and ordered that the costs should be taxed and paid out of the estate.

Mr. Botchway appealed from that judgment to the Land Court at Accra. On September 29, 1948, despite an objection

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that the Land Court had no jurisdiction in the matter as it was a succession case, Smith J. allowed the appeal and substituted a declaration that the appellants were entitled to one-third of the property of the deceased and to an accounting from Mr. Botchway of one-third of the rents and profits from December, 1935, to 1946. He awarded costs to Mr. Botchway.

From that decision the appellants appealed to the West African Court of Appeal, including in their grounds of appeal the objection that the Land Court had no jurisdiction to hear Mr. Botchway's appeal as the matter was not a land cause or matter. On or about May 13, 1950, Mr. Botchway died, and on January 30, 1951, the respondent as the duly appointed head of the family was substituted for him as respondent to the appeal. On February 1, 1951, the West African Court of Appeal (Blackall P., Lewey J.A. and Coussey J.) rejected the contention that the matter was not a land cause or matter, and on March 8, 1951, delivered judgment on the merits. They dismissed the appeal but set aside the order of the Land Court declaring the appellants' right to one-third of the property of the deceased and to an account of one-third of the rents and profits of the estate. They awarded costs to Mr. Botchway.

From that decision the appellants appealed to the Judicial Committee.

The main questions for decision in the appeal were: (i) A preliminary question, whether the appeal from the Native Court, who awarded the whole estate to the children of the deceased, was to the District Commissioner's Court as being a suit concerning the succession to the property of the deceased or was to a Land Court of the Supreme Court as being a suit relating to the ownership, possession or occupation of land. If the answer to the preliminary question was that the appeal was properly brought to the Land Court; (ii) whether the Land Court was right in reversing the judgment of the Native Court on questions of fact and of native law; (iii) whether the West African Court of Appeal was right in the variation it made in the order of the Land Court.

1956. March 7, 8, 12. *T. G. Roche Q.C.* and *Gilbert Dold* for the appellants. The action arose out of a dispute as to who, in the events which have now occurred, was entitled to participate in the estate of Jacob Vanderpuye, a Ga, who died in 1918 intestate and without children of a Christian marriage. His property passed according to native customary law and not under any Ordinance, and by the native law which is applicable to this case a man's property is not divided on his death, but is held as one fund, and the income goes to the persons who may be entitled from time to time. As distinct from patrilineal succession the Fantis recognize matrilineal or uterine succession. The Ga's system is a compromise between the two. Decided cases show that after the death the family appoint someone as head, who is in the nature of a trustee; his appointment is a temporary one —he may be removed by the family and he is not a beneficial owner in his own right; he has to divide the property amongst those entitled, including himself.

The other person to whom reference must be made is the heir and successor. He is, normally speaking, the eldest surviving brother from the mother's womb. If there is no brother, and that is here a disputed matter and has not been settled, it is the nephew, being a son of the sister of the deceased in the uterine line. The heir is not the sole beneficiary; he administers the property, subject to the rights of the family, for himself and others.

The actual point for decision arises in this way: Jacob Vanderpuye died in 1918, and for the next 15 years the property was administered by his eldest son, who had been appointed head of the family. He, apparently, was a supporter of the patrilineal succession, and he tried to exclude the deceased's sister's son, one Solomon. The courts decided against him, and the sister's son was admitted as heir and successor. He could not administer the property, however, because the family had appointed the eldest son to do that.

In 1934 the appellants established that they were children by six-cloth marriages of Jacob Vanderpuye and as such entitled to participate in his estate. In 1947 the present proceedings were begun asking the Ga Native Court B to declare what share the children should have. By this time Solomon, the heir and successor, had died. The Native Court B declared that the interest of the six-cloth children in the estate of the deceased was the whole estate. The Land Court, to whom there was an appeal, after overruling an objection by the present appellants that the suit was not a land case but a succession case and that the Land Court had therefore no jurisdiction to entertain the appeal, allowed the appeal and declared that the present appellants were entitled to one-third of the deceased's property.

The issues before the Board are: (1) Whether the Land Court had jurisdiction to entertain the appeal from the decision of the

Native Court B. (2) Assuming that it had jurisdiction, whether it was clearly shown that the Land Court was right in holding that the Native Court had erred. That depends on native custom which, on the authorities, has to be proved or has to have been so often accepted by the courts as to be notorious. (3) Assuming that the Board is against the appellants on all the other points, can the ultimate decision of the West African Court of Appeal be sustained?

With regard to the jurisdiction point, the Court of Appeal below distinguished *George Hagan* v. *Effuah Adum*,[1] but that case, it is submitted, was essentially a dispute as to succession and not as to title to land, and it is relied on as showing that the claim of the children here for a declaration to the share is not akin to ownership of land. Accordingly, by virtue of the provisions of section 46 of the Native Courts (Colony) Ordinance, 1945, the Land Court had no jurisdiction to entertain the appeal. [Reference was also made to *Ekuah Mansah* v. *Kofi Ambradu*,[2] *Adu Kofi* v. *Chief Kwesi Brentuo*[3] and *Archie Kwow* v. *Ohene Essien Eku II.*[4]] The Land Court having acted without jurisdiction its judgment and that of the West African Court of Appeal should be set aside and that of the Native Court B restored.

L. G. Scarman for the respondent. The submission on the preliminary jurisdiction point is simply that the succession has already been determined by the Supreme Court on October 30, 1945, in *P. R. Vanderpuye* v. *Botchway*[5] in favour of the present appellants, and that the issue which was before the Native Court B was not one of succession at all. For that purpose a distinction is to be drawn between determining whether a member of a family is entitled to a share at all, and determining the extent of the share. The right to have anything is a right of succession under Ga customary law; what the share is has also to be determined under Ga customary law, but has no relevance to the question of succession; it is entirely a matter for the head of the family to determine, bearing in mind the circumstances when application is made to him for a share. An issue as to the extent of the share is a land matter; the present claim is certainly a land claim. It is not a matter of succession, because the extent of the share of the land to be appropriated to them depends not on their rights as successors to their father, but on what the head of the family, or, if he refuses to act, the court, thinks is fair and reasonable.

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[1] (1939) 5 W.A.C.A. 35.
[2] (1941) 7 W.A.C.A. 204.
[3] (1944) 10 W.A.C.A. 92.
[4] (1934) 2 W.A.C.A. 180.
[5] Not reported.

The principle accepted by the West African Court of Appeal in *Adu* v. *Dapaa* [6] is that one must look at the substance of the matter to determine what is the main issue between the parties. It is a succession case if succession is the main issue and possession, ownership and occupation only incidental; but if it be ownership, possession or occupation, with succession only incidental, then it is a land cause. The question here is as to what is fair and reasonable in the way of division under native customary law as among persons whose right to succession has already been determined. The dispute between these parties was as to the ownership, possession or occupation of lands to which all of them had been held by previous decisions to have an entitlement by succession. The Native Court in the circumstances here was quite wrong in thinking that it was being asked to decide a question of succession. [Reference was made to *Ashong* v. *Solomon* [7] and *Botchway* v. *Solomon*.[8]]

It is submitted that the head of the family is the heir and successor, and there is no such distinction between them in Ga customary law as was suggested by counsel for the appellants. The head of a family always has a beneficial interest in the family property; there is evidence to that effect and none to the contrary. All that is being claimed in this case is a declaration as to the extent of the share and appropriation of the property representing the share, because the head of the family has not done his duty. This is a land cause. *Hagan's* case [9] is distinguishable.

Even if the Board should take the view that *Ashong* v. *Solomon* [10] and *Botchway* v. *Solomon*,[11] on which reliance is placed for the submission that succession has already been determined, do not support the respondent to the full extent of that submission, it is further urged that there is really no doubt but that under native customary law the son of a maternal aunt has an interest in the family property of the deceased: Sarbah's Gold Coast Fanti Customary Laws, 2nd ed., pp. 102 and 274; although that deals with Fanti customary law, it is clear that it relates also to the Ga country. There is no authority for the proposition that a person who by descent through females becomes an heir and successor, and is a member of the family, has no beneficial interest in that family property.

[6] Not reported. (March 2, 1950.)
[7] Not reported. (June 28, 1935.)
[8] Not reported. (Dec. 7, 1935.)
[9] 5 W.A.C.A. 35.
[10] Not reported.
[11] Not reported.

The 1945 litigation is plain authority for the proposition that the head of the family's duty is to decide the amount of the share, and reading that case as a whole, and having particular reference to the Ga native custom, a clear distinction may be drawn between entitlement to come into the family, which is a matter of succession, and the question of what share is to be received. *A. V. Sackeyfio* v. *Ayichoe Tagoe*[12] supports the proposition that all interests which depend on succession have already been determined before the commencement of this litigation, including the issue whether or not the defendant had a beneficial interest in the estate. This is a land case because the property that is to be shared is land, and, because both sharing and appropriation are asked for, ownership of land is in issue. The preliminary point should fail.

Roche Q.C. in reply on the preliminary point. The issue is not whether the case was concerned with land; the appellants are claiming a declaration of a share in the estate, and that part of *Hagan's* case[13] which defines a succession case is relied on.

April 23. The judgment of their Lordships was delivered by LORD COHEN, who stated the facts set out above and continued: Mr. Roche, on behalf of the appellants, intimated that he would repeat the submission that the Land Court of the Supreme Court of the Gold Coast had no jurisdiction to entertain the appeal against the judgment of the Ga Native Court and would also submit that on the merits the judgment of the West African Court of Appeal was erroneous and misconstrued Ga native customary law.

Their Lordships heard argument first on the question of jurisdiction and, in view of the conclusion they reached on this point, did not find it necessary to go into the question of the correctness of the decision on the merits.

To appreciate the points argued on the question of jurisdiction their Lordships must refer not only to the provisions of the Native Courts (Colony) Ordinance (c. 98 of the Laws of the Gold Coast, 1951), which came into force on April 1, 1945, and was therefore the relevant ordinance when this suit was commenced, but also to the provisions of an earlier Ordinance, the Native Administration Ordinance (c. 111, 1928).

At the date of the last mentioned Ordinance the Native Court was called a Paramount Chief's Tribunal, and by section 43 of the Ordinance that tribunal was given jurisdiction only in relation

[12] (1945) 11 W.A.C.A. 73.

[13] 5 W.A.C.A. 35, 39.

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to certain specified matters and "any other causes and matters "by this Ordinance expressly assigned to a Paramount Chief's "Tribunal or to a Divisional Chief's Tribunal." Among the matters referred to in section 43 (2) were "(*c*) Suits relating to "the ownership, possession or occupation of lands situated within "the State of such Paramount Chief; . . . (*f*) Suits and matters "relating to the succession to the property of any deceased native "who had at the time of his death a fixed place of abode within "the State."

The question under which head a particular suit fell might be important not only as deciding which native tribunal had jurisdiction in the matter but also because appeals in land causes lay to the Provincial Commissioner's Court whereas appeals in cases of succession lay to the Court of the District Commissioner: see, e.g., *Ekuah Mansah* v. *Kofi Ambradu.*[1] This case followed the decision of this Board in *George Hagan* v. *Effuah Adum.*[2] In the last-mentioned case it was argued [3] that subhead (*f*) included only suits as to the right to succeed and did not include such matters as valuation of the estate, a declaration as to the amount of the share to which a successor was entitled, or the distribution of the estate. Their Lordships rejected this contention, saying that they saw no reason for such a narrow construction of the words "suits and matters relating to the succession to the "property," as in their opinion, distribution of the property naturally came within the meaning of those words, and valuation of the estate was necessarily incidental to the ascertainment of the shares for the purpose of distribution.

It has been suggested that a case might fall under both headings, thus offering a litigant dissatisfied with the decision of a Native Court a choice of court to which to appeal. This argument has been rejected, and as their Lordships think rightly rejected, by the West African Court of Appeal. See, e.g., *Archie Kwow* v. *Ohene Essien Eku II*,[4] where Kingdon C.J. said, when dealing with the question whether a cause was a suit relating to the ownership, possession or occupation of land, "in cases such "as this the real issue between the parties must be the test and "not merely the wording of the suit." See also *Adu* v. *Dapaa*,[5] decided in the West African Court of Appeal on March 2, 1950. In that case Smith J. said that it has long been the policy of appeal courts hearing appeals from Native Courts to look beyond the wording of the claim as brought and to decide the real matter in issue by a study of the whole record of the case. The inconvenience of allowing a choice of courts is manifest, since two Native Courts might simultaneously be exercising jurisdiction in relation to the same issue, one at the suit of a member of the family who relied on the location of the land, the other at the suit of another member of the family who relied on the fact that the deceased had a fixed place of abode within the jurisdiction of that other court.

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[1] (1941) 7 W.A.C.A. 204.
[2] (1939) 5 W.A.C.A. 35.
[3] Ibid. 39.
[4] (1934) 2 W.A.C.A. 180.
[5] Not reported.

The decision of this Board in *George Hagan* v. *Effuah Adum* [6] seems at first sight conclusive in favour of the appellants, but Mr. Scarman, for the respondent, submitted (1) that an alteration in the law had been effected by the 1945 Ordinance so that the decision in the case cited is not applicable; (2) that whereas in the present case only the quantum of the share is a live issue, in the case cited the right to succeed as well as the quantum of the share was in issue and that this established a vital distinction between the present case and the case cited.

To appreciate the first point their Lordships must refer to certain provisions of the 1945 Ordinance. Section 13, so far as material, provides as follows: "(1) Every Native Court shall have "full jurisdiction and power to the extent set forth in the order "of the Governor in Council establishing it and, subject to the "provisions of this Ordinance, in all civil and criminal causes in "which the parties are persons subject to the jurisdiction of "Native Courts. (2) For the purposes of subsection (1) the "Governor in Council may by the order made under section 3 "grade the Native Court thereby constituted and there shall be "four grades of Native Courts, namely, grades A, B, C, and D, "and the jurisdiction and power of any Native Courts of these "grades shall not exceed those prescribed in the First and "Second Schedules hereto in respect of each such grade."

Section 14 draws a distinction between land causes and civil causes other than land causes, and provides that land causes shall be tried and determined by a Native Court having jurisdiction over the area in which the land which is the subject-matter of the dispute is situated, whereas in other civil causes jurisdiction depends on the area in which the defendant was at the time the cause of action arose.

Part 8 of the Ordinance deals with appeals. Section 46 deals with appeals from a Native Court grade B or grade C or grade D, and provides that in a case such as the present, where there is no

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[6] 5 W.A.C.A. 35.

Native Court of Appeal constituted under section 3 of the Ordinance, the appeal is to the Magistrate's Court or in the case of a land cause, to the Land Court.

Section 2 (the interpretation section) provides that "Land "Cause" and "Land Matter" means a cause or matter relating to the ownership, occupation, or possession of land, and that "Land Court" means a Land Court constituted and formed under the Courts Ordinance. Section 24 (2) of the Courts Ordinance provides for the establishment of a Land Court of the Lands Division of the Supreme Court.

Mr. Scarman pointed out that whereas in the earlier Ordinance there had been an express reference to succession, neither the jurisdiction section of the 1945 Ordinance nor the appeals section of that Ordinance contained any express reference to succession, and he submitted that if on the face of the pleadings it appeared that the matter did affect the ownership, possession or occupation of land, the matter was a land cause or matter within the meaning of the Ordinance.

Their Lordships think, however, that the distinction between the two Ordinances is in this respect apparent not real, for section 13 (2) brings in the Schedules to the Ordinance, and the Second Schedule makes it clear that the jurisdiction of a Native Court may depend on the category into which a particular suit falls. The categories set forth in the Schedule are substantially the same as those appearing in paragraphs (*a*) to (*f*) of section 43 (2) of the Ordinance of 1928. It is plain, therefore, that the jurisdiction of a Native Court to deal with a matter depends on whether the cause is a suit relating to the ownership, possession or occupation of land or a suit relating to the succession to property of a deceased native. In their Lordships' opinion, therefore, the decisions under the earlier Ordinance still apply. They decided that a suit must fall into one category or the other and that in order to determine into which category a particular suit falls the court must apply the test of what is the real issue between the parties and not look only at the wording of the plaint. Accordingly, their Lordships hold that a cause is not a land cause within the meaning of section 46 of the 1945 Ordinance if the substance of the issue between the parties was succession to the property of a deceased native.

Mr. Scarman submitted that the substance of the present case is not succession since, as he said, the right of both parties to succeed as distinct from the quantum of the share had been determined in previous litigation. So far as the appellants were

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concerned, he said that that issue had been determined in their favour by the Supreme Court (East Judicial division) given on October 30, 1945, in the case of *P. R. Vanderpuye* v. *Botchway*, a copy of which decision forms exhibit " A " in the present suit. So far as the respondent was concerned, he said that the issue had been determined in favour of Mr. Botchway and the respondent by decision of the Supreme Court given on June 28, 1935, in the case of *Ashong* v. *Solomon* as interpreted by a later decision of the Supreme Court in the case of *Botchway* v. *Solomon* given on December 7, 1935, copies of such decisions being exhibits " C " and " D " in this suit.

The parties do not appear to have treated these decisions as binding them on the question of entitlement. Before the Native Court the appellants appear to have claimed the right to the whole of the estate, and Mr. Botchway appears to have argued his right to succeed through his mother. It seems doubtful, therefore, whether the facts afford the necessary support for Mr. Scarman's argument. Their Lordships, however, prefer to base their decision that the suit was not a land cause, and that the Land Court had therefore no jurisdiction to entertain the appeal from the Native Court, on the wider ground that a suit for the determination of the share of the appellants and for the distribution of the estate is a succession case and not a case relating to the ownership, possession or occupation of land. Such decision is in accordance with what their Lordships consider to be the ratio decidendi of this Board in *George Hagan* v. *Effuah Adum*,[7] and for the reasons already stated their Lordships think that that case is still relevant despite the enactment of the 1945 Ordinance.

The West African Court of Appeal thought that the present case was more analogous to *Archie Kwow* v. *Ohene Essien Eku II*[8] than to the case last cited. The *Archie Kwow* case is not fully reported, but it appears that the substance of the matter was a claim to a share of rents and the question was whether this was a land cause or a money cause action. There is nothing to indicate that the plaintiff's claim was based on any right of succession, and their Lordships are unable to derive any assistance from the case except so far as it decides that the court must look to the substance of the dispute between the parties in determining whether the cause is a land cause. For the reasons already stated, their Lordships are of opinion that the substance of the present dispute is a succession case.

Mr. Scarman asked their Lordships, in the event of their

[7] 5 W.A.C.A. 35.

[8] 2 W.A.C.A. 180.

holding that the Land Court had no jurisdiction, to make a declaration to that effect and to send the matter back to the West African Court of Appeal. Their Lordships see no reason for making such an order. The necessary consequence of the lack of jurisdiction of the Land Court is that the order of the Native Court stands. Alternatively, he asked that there be inserted in the Order in Council some such words as "without prejudice to "the right, if any, of the respondent to apply to the appropriate "court in the Gold Coast for leave to appeal out of time from "the order of the Native Court." Their Lordships see no reason for the insertion of any such words. If such right exists nothing in the order which their Lordships propose will prevent the making of the application to the proper court. Their Lordships desire to say nothing which could in any way fetter the discretion of that court in dealing with such application if made.

For these reasons their Lordships will humbly advise Her Majesty that the appeal be allowed, the orders of the West African Court of Appeal and of the Land Court be set aside, and the order of the Native Court be restored. The respondent must pay the costs of the appeals to the Land Court, the West African Court of Appeal and to this Board.

Solicitors: *A. L. Bryden & Williams; Sydney Redfern & Co.*

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COMMISSIONER OF STAMP DUTIES OF NEW SOUTH WALES . . . . APPELLANT;

AND

PERMANENT TRUSTEE CO. OF NEW SOUTH WALES . . . . . . RESPONDENT.

ON APPEAL FROM THE HIGH COURT OF AUSTRALIA.

Revenue—Estate duty—Gift inter vivos—Reservation of benefit—Death duty—Settlement—Possession and enjoyment of trust property not retained by beneficiary to entire exclusion of testator—Interest in income retained by testator—Duty payable on trust property—Stamp Duties Act, 1920–1940 (*N.S.W.*), *s.* 102 (2) (*d*).
Australia.

By section 102 of the Stamp Duties Act, 1920–1940, of New South Wales: "For the purposes of the assessment and payment "of death duty . . . the estate of a deceased person shall be

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* *Present*: VISCOUNT SIMONDS, LORD MORTON OF HENRYTON, LORD COHEN, LORD KEITH OF AVONHOLM, LORD SOMERVELL OF HARROW.

"deemed to include . . . (2) . . . (*d*) Any property comprised "in any gift made by the deceased at any time . . . of which "bona fide possession and enjoyment has not been assumed by "the donee immediately upon the gift and thenceforth retained "to the entire exclusion of the deceased, or of any benefit to him "of whatsoever kind or in any way whatsoever . . ."

A testator, who died domiciled in New South Wales in 1946, by a deed of settlement in 1924 had transferred to the respondent trust company certain shares, property and investments on trust to apply the whole or such part of the income thereof as the respondent company should think fit for the maintenance, education and general support of his daughter until she should attain the age of 30 or marry, and on her attaining that age to pay over to her the balance of the trust fund with all accumulations of income for her sole and separate use.

The testator's daughter married in July, 1938, and attained the age of 30 in February, 1940. Meanwhile, on December 1, 1938, pursuant to the testator's instructions, she wrote to the respondent company authorizing them to take instructions from her father in all matters regarding her trust and in a new account which he was opening in a bank in her name; on December 29 she wrote to that bank authorizing her father to operate on her account in the fullest possible manner—and it was found as a fact that the testator had authority to withdraw money from that account without first obtaining his daughter's approval; and on January 9, 1939, she instructed the respondent company to pay into her account at the bank any money coming in from the trust, and that was done. Up to April, 1943, the testator had drawn out practically the whole of the moneys paid into the account and used the greater part for his own purposes. It did not appear that the daughter at any time herself drew on her account, nor did she revoke any authority she had given before the testator's death. It was common ground that the sums thus withdrawn by the testator from his daughter's account were to be regarded as loans made by her to him without interest. On the footing that the sums in question were loans the appellant, the Commissioner of Stamp Duties, in assessing the death duty payable in respect of the estate of the testator, included therein a sum representing the value at the date of his death of the trust property:—

Held, that death duty was payable on the value of the trust property. The inference was inevitable that from 1939 onwards the testator was master of the income as it was paid over by the trustee, and the conclusion was irresistible that the daughter did not retain bona fide possession and enjoyment of the trust property to the entire exclusion of her father or of any benefit to him. The design and result of the arrangement were that the daughter's possession and enjoyment were reduced and impaired precisely by the measure of the testator's use and enjoyment of her income.

O'Connor v. *Commissioner of Succession Duties* (*South Australia*) (1932) 47 C.L.R. 601 approved.

Judgment of the High Court of Australia (1954) 91 C.L.R. 1 reversed.

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COMMISSIONER OF STAMP DUTIES OF NEW SOUTH WALES
v.
PERMANENT TRUSTEE CO. OF NEW SOUTH WALES.

APPEAL (No. 36 of 1955), by special leave, from a judgment of the High Court of Australia (August 19, 1954), which by a majority reversed a unanimous judgment of the Full Court of the Supreme Court of New South Wales (June 1, 1953), on a case stated under the New South Wales Stamp Duties Act, 1920–1940.

The following introductory statement is taken substantially from the judgment of the Judicial Committee: Arthur Henry Davies, hereinafter called "the testator," died on January 28, 1946, domiciled in New South Wales. The question for determination in this appeal was whether by virtue of section 102 (2) (*d*) of the Stamp Duties Act, 1920–1940, of New South Wales, his estate was for the purpose of assessment and payment of death duty to be deemed to include certain trust funds (valued at £38,162 13s. 7d. at the date of his death) which were then subject to the trusts of a deed of settlement made by him on August 13, 1924.

The relevant section was in the following terms: "102. For "the purposes of the assessment and payment of death duty but "subject as hereinafter provided the estate of a deceased person "shall be deemed to include and consist of the following classes "of property:—(2) (*d*) Any property comprised in any gift made "by the deceased at any time whether before or after the passing "of this Act of which bona fide possession and enjoyment has "not been assumed by the donee immediately upon the gift and "thenceforth retained to the entire exclusion of the deceased, or "of any benefit to him of whatsoever kind or in any way whatsoever whether enforceable at law or in equity or not and "whenever the deceased died."

The deed of settlement of August 13, 1924, purported to be made between the testator of the first part, Muriel Norah Davies, his daughter, of the second part, and the respondent, the Permanent Trustee Co. of New South Wales (the executor of the will of the testator) of the third part, but was executed by the testator and the respondent company only. Its principal provisions were as follows (the daughter being referred to as "the "beneficiary" and the respondent as "the trustee"):—"(1) The trustee shall stand possessed of the trust fund whether "there shall or shall not be any other fund applicable to the "maintenance and education of the beneficiary or any person "bound by law to provide for such maintenance and education "upon trust:—(*a*) To apply the whole or such part as the "trustee shall think fit of the income arising from the trust

" fund for or towards the maintenance education and general " support of the beneficiary in such manner in all respects as the " trustee may think proper until such beneficiary attains the age " of thirty years or marries with the written consent and approval " of her parents the said Arthur Henry Davies and Muriel Davies " or of the survivor of them provided that in case the beneficiary " shall marry during the lifetime of her parents without such " consent as aforesaid the trustee shall continue to apply the " income in manner aforesaid until the beneficiary attains the " age of thirty years. (*b*) To accumulate the residue (if any) of " the same income which in the judgment of the trustee may " not be required for the purposes aforesaid or any of them in " the year in which such income may have arisen by way of " compound interest by investing the same and the resulting " income therefrom for the benefit of the beneficiary or other " the person or persons who under the trusts hereinafter contained shall have become entitled to the trust fund Provided " that the trustee may resort to the accumulations of any preceding year or years and apply the same for any of the " purposes hereinafter mentioned for the benefit of the beneficiary. (2) In case of the marriage of the beneficiary without " such consent as aforesaid before attaining the age of thirty " years the trustee may with the written consent of her parents " or the survivor of them at any time after such marriage pay " over to the beneficiary one half of the trust fund together with " any accumulations of income then in the hands of the trustee. " (3) On the beneficiary attaining the age of thirty years the " trustee shall pay over to her the balance of the trust fund or " the whole of such trust fund if still in the hands of the " trustee together with all the accumulations of income then in " hand for her sole and separate use. (4) In case the beneficiary " shall attain the age of twenty-one years or marry under that " age with such consent as aforesaid the trust fund shall be held " by the trustee upon trust for such person or persons and in " such manner in all respects as the beneficiary shall by will or " codicil appoint."

The daughter was born on February 22, 1910, and came of age on February 22, 1931. During her minority the respondent company made payments of £1,000 annually from 1926 to 1930 to the testator while he was maintaining and educating her, and also made two further such payments in 1931 and 1932, and at her request further similar payments in each of the years 1933 to 1937. On July 1, 1938, she married one Jackaman at

Alexandria in Egypt. On February 22, 1940, she attained the age of 30, and it had been assumed and was common ground that she then became absolutely entitled to the corpus of the trust funds.

The facts in relation to the disposal of the income of the trust fund from 1939 onwards appear fully from the judgment of the Judicial Committee.

The Full Court of the Supreme Court of New South Wales (Street C.J., Owen and Clancy JJ.) unanimously held that the sum of £38,162 13s. 7d. should have been included in the dutiable estate of the testator.

On appeal, the High Court of Australia (Webb, Kitto and Taylor JJ., Dixon C.J. and Fullagar J. dissenting) held that that sum should not have been included in the testator's dutiable estate.

1956. April 23, 24 and 25. *Gordon Wallace Q.C.* (Australia), *Anthony Cripps* and *J. S. Hobhouse* for the appellant. The appeal relates to a transaction which it is submitted is caught by section 102 (2) (*d*) of the Stamp Duties Act, 1920–1940, of New South Wales. There are two broad branches of argument: (1) That the admitted benefit was of a type which is caught by the section in that it did impair the possession and enjoyment of the gift by the donee—the situation here prevented her from being in entire possession and enjoyment. (2) In the alternative, the doctrine of impairment is not attracted by the section at all. The question depends on what are the proper facts to be taken into consideration and on the correct view of those facts. In this type of case it is perfectly correct, to obtain the legal result of the transaction, to look at all the documents and all the circumstances of the case, and if that course is taken here it is submitted that the view expressed by Dixon C.J. and Fullagar J. was right. It is a question of the overriding intention on the part of the donor. If the transaction results in the donor having any type of possession, e.g., merely as a licensee, it would be sufficient. The income disappears in the hands of the donee and reappears in the hands of the donor, and it does not matter in what form it reappears so long as it is a species of possession. If the daughter here handed a bag of sovereigns to a third party as bailee and said to him, " allow my father to use them for his own purposes," that would be caught by the section. In the facts and circumstances of this case the donee did not retain bona fide possession and enjoyment of the interest given to her to the entire exclusion

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of the donor or of any benefit to him, and the section was therefore applicable. The donor obtained a benefit from the given property within the meaning of the words in the section.

With regard to the authorities, in *Inland Revenue Commissioners* v. *Westminster (Duke)*[1] their Lordships read all the documents in the case; they found that all that had happened was that there had been an unqualified covenant to pay the annuity; the way they dealt with *Secretary of State in Council of India* v. *Scoble*[2] is helpful to the appellant here—they said that all the circumstances and all the documents must be considered. In *St. Aubyn* v. *Attorney-General*[3] Lord Radcliffe said: "It was decided long ago in *Attorney-General* v. *Worrall*[4] that "a contractual benefit may interfere with the exclusive possession and enjoyment required by such a provision (in that case "section 11 (1) of the Customs and Inland Revenue Act, 1889), "even though it does not amount to a reservation out of the "property that is the subject of the gift." That is the course this Board should take in the present case; it gives effect to the realities of what took place. The majority of the High Court in this case were wrong in their application of the decision in *Oakes* v. *Commissioner of Stamp Duties of New South Wales*[5] to the facts of the present case. The letter of December 1, 1938, from the daughter to the respondent company in which she said, "I "hereby authorize you to take instructions from my father . . . "in all matters regarding my trust, and in the new account he "is opening in my name in the Bank of New South Wales . . . ," was itself a permit to obtain possession and enjoyment of the property. True, it was only at that stage a potential power, but it was intended to give her father the right to use the trust fund for his own purposes—for him to get a benefit. *Inland Revenue Commissioners* v. *Clarkson-Webb*[6] and *Cohen and Moore* v. *Inland Revenue Commissioners*[7] are further authority to show that it is quite proper and, indeed, desirable, when considering liability to tax and duty arising out of a particular deed, to see all the circumstances and documents and how they inter-connect and what is their true effect. The present case is not distinguishable from *O'Connor* v. *Commissioner of Succession Duties (S.A.)*.[8]

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[1] [1936] A.C. 1, 20; 51 T.L.R. 467.

[2] [1903] A.C. 299; 19 T.L.R. 550.

[3] [1952] A.C. 15, 47; [1951] 2 All E.R. 473.

[4] [1895] 1 Q.B. 99; 11 T.L.R. 48.

[5] [1954] A.C. 57; [1953] 2 All E.R. 1563.

[6] [1933] 1 K.B. 507.

[7] [1933] 2 K.B. 126.

[8] (1932) 47 C.L.R. 601.

There is another aspect of the case: one of the reasons given in the judgment of the majority judges in the High Court is that[9] "unless the benefit is such as to diminish the possession and "enjoyment which the donee might otherwise have had, the "conditions for the application of section 102 (2) (*d*) are not "satisfied: *Oakes* v. *Commissioner of Stamp Duties.*[10]" It is submitted that on the true construction of the facts, and on the particular inferences which have been drawn from those facts, there has been a diminishing of possession and enjoyment which the donee might otherwise have had. So there was here not only a benefit, but one which impaired or trenched upon the enjoyment of the donee. It is submitted, however, that there need not be impairment. There was impairment here, but the doctrine of impairment should be eliminated once and for all, and it is suggested that the indications to the contrary in *Oakes's* case[11] should be altered by the Board.

Dixon C.J. and Fullagar J. were correct in drawing the inference that the loans to the testator from the daughter were repayable only at death. For the purposes of section 102 the given property is that property in whatever shape it may have been transmitted so long as it really remains representative of the property actually given: *Way* v. *Commissioner of Stamp Duties (N.S.W.)*[12]; *Dent* v. *Commissioner of Stamp Duties (N.S.W.).*[13]

Summarizing: (1) On the facts the transaction should be looked at as a whole in order to ascertain its legal effect. (2) The fact that the possession and control were in this case acquired by loan is immaterial; such a feature only goes to quantum of possession and not to the existence or quality of possession. (3) The facts here show that the father was put into control and possession of the given property. (4) The father not only received a benefit, but received a benefit which impaired the complete possession and enjoyment of the given property by the donee. (5) In law, impairment of, or trenching upon, the enjoyment is not a necessary ingredient under the section in question when making out a case which is caught by the section.

Sir Garfield Barwick Q.C. (Australia) and *J. G. Le Quesne* for the respondent. It is of fundamental importance to identify the property given, because the only possession which can be taken is that of which the thing is capable. In this case the relevant property given on the date of the settlement was the equitable right to demand the income of a fund for a stated span of years and nothing more. The daughter took immediate possession and enjoyment of that. She had not encumbered the deed by something which diminished its effect. She immediately took possession of that equitable right which the deed gave her. The only possession of which section 102 (2) (*d*) speaks is that possession of which the property is capable. If the property was not susceptible of immediate possession and enjoyment it does not fall within the section. The daughter could not get possession of the corpus; the only thing of which she could take possession was the right which the deed gave her—the equitable right to income. She never lost that right, and she did not compromise it by anything that she did. That equitable right was susceptible of immediate possession and enjoyment through the trustee. Then the question is, was that property retained to the entire exclusion of the testator? It was. It is essential to distinguish the right to the income from the money which is the income; it may be that no income was produced.

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[9] (1954) 91 C.L.R. 1, 39.

[10] [1954] A.C. 73, 74, 75.

[11] [1954] A.C. 57, 73.

[12] (1949) 79 C.L.R. 477, 494.

[13] (1909) 9 C.L.R. 406, 422.

The authority to draw on the bank account would be necessary to meet any commitments the daughter may wish on her behalf. The right view of the facts here is that the daughter gave her father a fiduciary authority to give instructions in connexion with her trust affairs. There is no trace in the documents that he could, so to speak, feather his own nest as he liked. The authority given to him to withdraw money from the bank account did not amount to an assignment of her right to receive the income or in any sense diminish or cut down that right, its possession or its enjoyment.

O'Connor's case [14] is distinguishable, and it is impossible to hold that what the testator received in the present case was the income of the trust fund; it was money lent to him by his daughter out of her own bank account. In *O'Connor's* case [14] the donor retained possession of the title deeds of the fund, he had direct receipt of the income with no intervention of a trustee, and he had beneficial enjoyment of the income with no obligation to account for it. In this case, on the other hand, the income was paid by the trustee to the daughter, it came to her father only out of her bank account and by her authority, and he received it as a loan for which he in his lifetime, and after his death his personal representatives, were accountable to the daughter. What occurred in *Worrall's* case [15] really amounted to taking back something out of what was given; if the exclusive occupation or possession is resumed there is a benefit which cuts into what was given.

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[14] 47 C.L.R. 601.

[15] [1895] 1 Q.B. 99.

To say that the present case is on all fours with *O'Connor's* case [16] is to say that this testator on the facts was admitted to possession and enjoyment of the actual interest given. But here the thing given was the total equitable interest of the settlement. So the question is, did the daughter admit him to the possession or enjoyment of that interest in whole or in part? That amounts to this, did she make some of the income his own? She merely allowed him to enjoy her money, after it had come into the bank, which money was derived from and, be it so, identified with the produce of that interest. He was not admitted to the enjoyment of the thing given. On the facts there is the written authority to draw on the account plus the finding that she agreed that he could borrow money from the bank account. To find that it was a loan was to say that it was not his account; he could not borrow from his own account. To say that when moneys are borrowed the borrower gets a beneficial interest in the source of the moneys is not true. The testator was a fiduciary, and that meant that the income was still the daughter's. He was not admitted to the enjoyment of the equitable interest. [Reference was also made to *Commissioner for Stamp Duties (N.S.W.)* v. *Perpetual Trustee Co.*[17] and *Oakes* v. *Commissioner of Stamp Duties (N.S.W.)*.[18]]

A reply was not required.

May 16. The judgment of their Lordships was delivered by VISCOUNT SIMONDS, who stated the facts set out above and continued: Before the testator's daughter attained the age of 30 the series of transactions began which are decisive for the determination of this case. In stating them their Lordships rely on the facts and documents in the special case to be presently mentioned, such inferences as arise from those facts and documents and the findings on the trial of the issues, also to be mentioned.

The story begins with a letter which the testator wrote to his daughter on November 2, 1938, addressing her as "Dear "Cherry," by which name she was commonly known. After referring to a benefit that he took under his father's will and stating that he proposed to deal with it in such a way that the principal would pass to her account in New South Wales while he in the meantime benefited by any interest that was made, he said that he was seeing the respondent trustee company that day and would advise her what she should write to them in the matter of instructions regarding transferring income abroad. There he broke off his letter and continued it later, saying that he had seen the trustee company and arranged with them to await her letter. He then proceeded, "The next thing I want "you to do is to write on a separate sheet addressed to them, "giving them the authority to take my instructions in all matters "regarding your trust or the new account I am opening in the "Bank of New South Wales in your name. This account will be "entitled Cherry Jackaman." Then, after explaining why he was opening this account, he said that he wanted her to sign a cheque and also the letter of authority to the bank, and also a specimen signature, and send them out by the first mail to him so that he could hand them to the bank there. He then further explained the reason for his action thus, "The reason why I "want you to sign the cheque is that your account will then "loan to me the amount and this in turn will reduce my over-"draft with the bank by a like amount and by doing so will "reduce the amount of interest I have to pay the bank. . . . "I am enclosing therefore as mentioned above one cheque . . . "for your signature Cherry Jackaman, one letter to the manager "of the Bank of New South Wales and two slips for your "specimen signature but please do not date the letter or the "cheque, as these will not take effect until I open the "account. . . ." And, finally, he said that it was his intention from time to time to pay more money into this account and by so doing "relieve my account of such amounts" if anything should happen to him suddenly.

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[16] 47 C.L.R. 601.

[17] [1943] A.C. 425, 440; [1943] 1 All E.R. 525.

[18] [1954] A.C. 57.

The daughter appears to have followed her father's instructions faithfully. On December 1, 1938, she wrote to the respondent company authorizing them to take instructions from her father in all matters regarding her trust and in the new account he was opening in her name in the Bank of New South Wales, and saying that the authority was to be a continuing one until withdrawn by her in writing. On December 29, 1938, she wrote to the Bank of New South Wales authorizing her father to operate on her account in the fullest possible manner, and on January 9, 1939, she wrote to the respondent company instructing them from then until further instructions from her to pay into her account at the bank any money coming in from her trust.

It is convenient at this stage to refer to two questions and answers upon the trial of issues subsequently directed, viz.:

"Question 4. After the opening of the said account on "December 29, 1938, did the testator have authority to with-"draw money from time to time from the said account by "drawing cheques thereon without first obtaining the approval "of the said Muriel Norah Jackaman to any particular with-"drawal?

"Answer. Yes.

"Question 4A. If the answer to Question 4 is Yes, did the "testator receive such authority prior to or at the time when he "opened the said account or subsequently?

"Answer. He received the authority prior to the time when "he opened the account."

The account of the transactions may be continued in the words of the testator to be found in a memorandum addressed by him to his daughter, which was not dated but can be attributed to June or July, 1939. He refers to a letter from the trustee company and to the amount of income from the settlement and proceeds: "On December 29 I opened an account with the Bank "of New South Wales for Cherry Jackaman and this is the "account I required your signature for and your authority to "work on, which you sent me some time ago. You will see from "the accompanying statement, which shows the position of this "account of yours with my books, that the account was opened "up just at the end of last year by my paying into it an amount "of £5,025 of my own money, since when, up to date, the "trustees have paid in £1,552 12s. 10d. This is because I told "them that whenever any funds from your investments reach "£100 they should be paid into this account, so the total "amount at present which has been paid into your account is "£6,577 12s. 10d., but withdrawn from it has been £6,400 5s. 0d. "This amount is made up of £5,000 which I withdrew (on the "day I deposited the £5,025) together with refunds of £750, "£150, £200, £300 to myself and an amount of 5s. for a cheque "book.

"The reason why I opened the account when I did was that "this £5,025, a gift from me, would be free of probate if I live "beyond three years of the date. All these withdrawals in my "books naturally stand as a credit to you, which in the event "of my dying my estate would have to pay them back before "my nett worth for probate purposes was assessed.

"It is necessary for these moneys to be 'loaned' to me so "that I can make the advances to you, through my London "account per the medium of letters of credit and such like.

"By doing it this way it removes any necessity for you to "advise anyone you have an income, because by law a father "can legally provide his children with living expenses, etc. Of "course when I see you I can go further into details, but I guess "you can understand there is no need at present for you to "know. In fact the less you know the better in case you are "asked any questions. The whole thing in fact is a gift from me "and not an income."

The practice thus begun was continued. All the income of the trust fund was duly paid into the daughter's account at the bank and no other money was paid into it. Up to April 4, 1943, the testator drew out practically the whole of the moneys paid into the account and used by far the greater part of them for his own purposes. In December, 1945, a further sum of £2,000 was withdrawn and applied for the benefit of the daughter. It does not appear that she at any time herself drew on her account nor did she revoke any authority that she had given before the testator's death which, as already stated, took place on January 28, 1946.

Though it was at one time disputed, it is now common ground that the sums thus withdrawn by the testator from the daughter's account are to be regarded as loans made by her to him without interest. There has been no finding of fact whether they were repayable at death or on demand or at some other time. In their Lordships' opinion the proper inference is that they were repayable out of the testator's estate on his death, but this appears to them to be an immaterial circumstance for the purpose of determining this case.

Upon the footing that the sums in question were loans the appellant in assessing the death duty payable in respect of the estate of the testator included therein (a) the sum of £38,162 13s. 7d., being the value at the date of his death of the trust property, and (b) the sum of £5,025 which he had paid into her bank account when it was opened on December 29, 1939. The respondent, as executor of the testator's will, claimed that both items were wrongly included: the contention in regard to £5,025 was abandoned, that in regard to the larger sum remained and remains.

The appellant accordingly, on November 20, 1951, stated a case under section 124 of the Stamp Duties Act, 1920–1940, by which he submitted for determination by the Supreme Court of New South Wales (inter alia) the question whether the said sum of £38,162 should be included in the dutiable estate of the testator. On March 10, 1952, the Full Court ordered that issues of fact agreed upon by the parties should be filed and tried before a judge sitting in the Equity Jurisdiction without a jury, and that all findings of such judge should be made subject to the right of either party to argue their relevance.

Issues of fact were duly agreed and filed, and after hearing oral evidence the Chief Judge in Equity made his findings. The questions and answers have for the most part already appeared expressly or implicitly in the narrative which has been given. But this further question and answer may be stated:—

"ISSUE 11: What were the motives of the testator in opening "the said account and depositing therein the sum of £5,025 and "what were his intentions as to the manner in which the said "account should be operated upon?

"FINDING: The motives of the testator in opening the said "account and depositing the said sum of £5,025 were his natural "love and affection for the said Muriel Norah Jackaman and his "intentions as to the manner in which the said account should be "used were:—(*a*) To deposit therein an amount of £5,025 as a "gift from him to the said Muriel Norah Jackaman. (*b*) To "withdraw from that amount with her concurrence the sum of "£5,000 as a loan from her to him. (*c*) To arrange that the "Permanent Trustee Company of New South Wales Limited "should pay into the said account with her concurrence the "income from the assets held upon the trusts of the deed executed by him in 1924. (*d*) To withdraw with her concurrence so "much of that income as he from time to time wished to be used "by him as he wished but subject to an obligation on his part "to repay to her the amounts not applied for her benefit or at "her request."

On June 1, 1953, the Full Court of the Supreme Court (Street C.J., Owen and Clancy JJ.) unanimously held that the sum in question was rightly included in the dutiable estate. The respondent appealed from this decision to the High Court of Australia which, by a majority, reversed it. The learned Chief Justice and Fullagar J. dissented, and it appears to their Lordships that their view is to be preferred.

Section 102 (2) (*d*) of the Stamp Duties Act has been the subject of much judicial discussion, as have been the corresponding provisions of the United Kingdom Finance Acts, but in the present case the difference of opinion in the High Court is due not to any difficulty in ascertaining the law but to that of correctly appreciating the facts to which the law is to be applied, a difficulty which, as has on more than one occasion been pointed out in the High Court, is not diminished by the transparent defects of the procedure by way of case stated. But, whatever limitations this procedure may impose upon an investigation of the facts, it appears to their Lordships that the inference is not only open but inevitable that from 1939 onward the testator was (to use the words of the Chief Justice) "master of the income "as it was paid over by the trustee." He was, too, in a position to ensure that it was so paid over. His dual authority from his daughter, which enabled him on the one hand to direct the trustee how her money should be disposed of and on the other to deal with it when it reached the bank, placed him in a position of unchallengeable control, unless and until it was revoked. And it was not revoked. In these circumstances the conclusion is irresistible that the daughter, who at material times was the sole beneficiary under the settlement, did not retain bona fide possession and enjoyment of the trust property to the entire exclusion of her father or of any benefit to him. Here it does not seem that any nice question arises whether it was from the subject-matter of the gift that the donor (the testator) was excluded or, alternatively, from any benefit, nor whether it is necessary that the benefit taken by the donor should impair the possession and enjoyment by the donee of the subject-matter of the gift. For here the design and the result of the arrangement were that the daughter's possession and enjoyment were reduced and impaired precisely by the measure of the testator's use and enjoyment of her income.

It was argued for the respondent that this was not the way in which the whole transaction should be regarded. It was said that when the testator, armed with the authority given by the daughter's letter of December 1, 1938, directed the trustee to pay the trust income to her bank account, he acted in a fiduciary capacity, and that when he drew upon that account for his own purposes, he was not using the trust income but was borrowing from her money which had lost its identity. She chose, it was said, to lend it to him: she might equally well have lent it to a stranger. In the joint judgment of Kitto and Taylor JJ. (in which Webb J. concurred) this is the decisive point. It would, they say, be difficult to resist this conclusion (i.e., a conclusion favourable to the appellant) if the testator, when he took moneys out of his daughter's bank account, had taken them free from any obligation of repayment. In that case, though the same relationship of creditor and debtor had been established between the bank and the daughter, the trust income presumably retained its identity so far at least that for the purpose of the section it could not be said that the donee had retained exclusive possession and enjoyment of the subject-matter of the gift. But this does not appear to their Lordships to be a valid distinction. The transaction must be viewed as a whole and, since an integral part of it was that the testator before the account was opened was authorized to draw on it for his own purposes, it is irrelevant whether, when he did draw on it, he was or was not under any obligation to repay. Gift or loan, he for his own advantage used her money, paying no interest for it, and by so much reduced her enjoyment of what was her trust income and nothing else. The obligation to repay affected the quantum of the benefit obtained by him: it did no more.

If this is the right view of the transaction, as their Lordships think it is, the case falls into line with *O'Connor* v. *Commissioner of Succession Duties (South Australia)*,[1] the correctness of which decision has not been questioned.

For these reasons, which are substantially those of the Chief Justice and Fullagar J., their Lordships are of opinion that this appeal should be allowed. The judgment of the High Court must be set aside and the judgment of the Supreme Court of New South Wales restored. Their Lordships will humbly advise Her Majesty accordingly.

There will be no order as to costs.

Solicitors: *Light & Fulton; Bell, Brodrick & Gray.*

C. C.

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[1] (1932) 47 C.L.R. 601.

COMMISSIONER FOR MOTOR TRANSPORT . APPELLANT;

AND

ANTILL RANGER & COMPANY PROPRIETARY LTD. . . . . RESPONDENT.

STATE OF NEW SOUTH WALES AND OTHERS . APPELLANTS;

AND

EDMUND T. LENNON PROPRIETARY LTD. RESPONDENT.

J. C.*

1956
July 10.

ON APPEAL FROM THE HIGH COURT OF AUSTRALIA.

Australia—New South Wales—State Act—Constitutional validity—Road traffic—Mileage charges imposed by Act—Invalid as interfering with freedom of inter-State trade—Charges unlawfully exacted—Act prohibiting recovery—Equally constitutionally invalid as impairing freedom of inter-State trade—State Transport (Co-ordination) Act, 1931–1951 *(N.S.W.)—State Transport Co-ordination (Barring of Claims and Remedies) Act, No.* 45 *of* 1954 *(N.S.W.), ss.* 3, 4, 5*—Commonwealth of Australia Constitution Act,* 1900 (63 *&* 64 *Vict. c.* 12), *s.* 92.

In *Hughes and Vale Proprietary Ltd.* v. *State of New South Wales* [1955] A.C. 241; [1954] 3 All E.R. 607 the Judicial Committee held that the provisions of the State Transport (Co-ordination) Act, 1931–1951, of New South Wales (the principal Act) requiring application to be made for a licence and all provisions consequential thereon in so far as they purported to apply to, and to the operators of, public motor-vehicles operated in the course of and for the purposes of inter-State trade were invalid as contravening section 92 of the Constitution of the Commonwealth of Australia, which provided that ". . . trade, commerce, and "intercourse among the States, whether by means of internal "carriage or ocean navigation, shall be absolutely free." The effect of that decision was that mileage charges had been unlawfully imposed upon and collected from the respondents, who were operators of public motor-vehicles engaged in inter-State trade, over a number of years. In consequence of the decision the State Transport Co-ordination (Barring of Claims and Remedies) Act, 1954, of New South Wales was passed, which purported in substance to validate the mileage payments and to prevent their recovery. On claims by the respondents to recover mileage payments which had been unlawfully exacted under the principal Act:—

Held, assuming that the respondents would have had a good cause of action but for the Barring Act of 1954, that the immunity accorded by that Act to the unlawful exactions was as offensive to the Constitution as the unlawful exactions themselves, and the denial of the right to recover them therefore equally

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* *Present*: VISCOUNT SIMONDS, LORD OAKSEY, LORD RADCLIFFE, LORD TUCKER, LORD COHEN.

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offended against section 92 of the Constitution. The effect of the Act of 1954 was that the burden on the respondents' trade remained just what it was; the freedom of their trade had been in the same degree impaired, and in letter and spirit section 92 was in the same measure defeated.

Judgments of the High Court of Australia (1955) 93 C.L.R. 83 affirmed.

Consolidated appeals (No. 5 of 1956), by special leave, from judgments of the High Court of Australia (June 9, 1955) in two separate cases. The High Court in the first case upheld a demurrer by the respondent in the first appeal, who was plaintiff, to a plea of the appellant, and in the second case overruled a demurrer by the appellants in the second appeal, who were defendants, to an amended statement of claim by the respondent.

The Judicial Committee in *Hughes and Vale Pty. Ltd.* v. *State of New South Wales* [1] held that the licensing provisions of the State Transport (Co-ordination) Act, 1931–1951, of New South Wales (the principal Act) did not apply to persons operating public motor-vehicles in the course of and for the purposes of inter-State trade on the ground that the requirement to be licensed infringed section 92 of the Commonwealth Constitution, which provided that "trade, commerce, and intercourse among "the States . . . shall be absolutely free." No decision was given in that case on the validity of mileage charges imposed under the Act of 1931–1951, but the effect of the decision was to prevent future imposition of mileage charges under that Act on inter-State transport operators, since they were no longer required to obtain a licence.

The result of the *Hughes and Vale* case [1] was that the mileage charges in respect of the use of New South Wales roads collected from traders engaged in inter-State journeys over a period of more than 20 years had been without legal authority. In consequence, the Parliament of New South Wales passed the State Transport Co-ordination (Barring of Claims and Remedies) Act, 1954, to validate the mileage payments and prevent their recovery. That Act, so far as material, provided: "3. Any and every cause "of action, claim and demand whatsoever by any person whom-"soever against Her Majesty or the State of New South Wales "or any Minister or the Superintendent of Motor Transport or "against any authority, officer or person acting or purporting to "act in the execution of the Principal Act—(*a*) for the recovery "of any of the sums collected, received or recovered in relation

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[1] [1955] A.C. 241; [1954] 3 All E.R. 607.

"to the operation of any public motor vehicle in the course of or "for the purposes of inter-State trade before the commencement "of this Act—(i) which were or purported to have been collected, "received or recovered pursuant to the provisions of subsection "four or subsection five of section eighteen or section thirty-seven "of the Principal Act; or (ii) which were or purported to have "been collected, received or recovered on, or pursuant to any "condition imposed on, the issue of a licence under the Principal "Act or of a permit under the Principal Act or of any document "purporting to be a licence or a permit under the Principal Act; "or (*b*) for or in respect of any act, matter or thing done or purporting to have been done before the commencement of this "Act by any Minister or the Superintendent of Motor Transport "or any authority, officer or person acting or purporting to act "in the execution of the Principal Act in relation to the operation "of any public motor vehicle in the course of or for the purposes "of inter-State trade, shall be and the same are hereby extinguished. 4. No action, suit, claim or demand whatsoever shall "lie or be brought or made or allowed or continued by or on "behalf of any person whomsoever against Her Majesty or the "State of New South Wales or any Minister or the Superintendent "of Motor Transport or against any authority, officer or person "for the recovery of any of the sums referred to in paragraph (*a*) "of section three of this Act or for or in respect of any act, matter "or thing done or purporting to have been done as aforesaid. "5. The provisions of this Act shall apply to proceedings pending "at the commencement of this Act as well as to proceedings "brought after the commencement of this Act."

The respondents to the first of these appeals brought an action claiming £39,955, as moneys had and received, for sums paid under protest by way of charges demanded under the Act of 1931–1951. The respondents to the second appeal had claimed £71,760 and also a declaration that the Barring Act of 1954 was invalid.

The High Court of Australia (Dixon C.J., McTiernan, Williams, Webb, Fullagar, Kitto and Taylor JJ.) held that the Barring Act, which was relied on by the appellants, was invalid on the ground that it contravened section 92 of the Commonwealth Constitution and that it therefore afforded no answer to the claims of the respective respondents.

1956. June 18, 19. *B. MacKenna Q.C.*, *R. Else-Mitchell Q.C.* (Australia) and *Anthony Cripps* for the appellants. These two

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appeals raise the same question—whether or not the State Transport Co-ordination (Barring of Claims and Remedies) Act, 1954, of New South Wales is a valid Act. In 1954 in *Hughes and Vale Proprietary Ltd.* v. *State of New South Wales*[2] the Judicial Committee held that the provisions of the State Transport (Co-ordination) Act, 1931–1951, of New South Wales in so far as they required persons operating public motor-vehicles inter-State to be licensed were invalid as infringing section 92 of the Commonwealth Constitution. A great number of inter-State traders had obtained licences and made payment, and to meet the situation all the States passed legislation in similar terms to the impugned Act of 1954 providing that the payment made for the invalid licences should not be recoverable. The High Court has held that the New South Wales Barring Act is itself invalid as infringing section 92 of the Constitution.

To succeed in these claims against the appellant State the respondents must establish that the State is obliged by the law of New South Wales to repay to them moneys which they had paid to it in the past; and that is so because (i) the claim is made in respect of moneys paid to the appellant in New South Wales, and (ii) the Commonwealth Constitution, in particular section 92, does not give the respondents any right to recover moneys from the appellant. For those two reasons the respondents must establish that they have their right under the law of New South Wales. Under the provisions of the New South Wales Constitution Act, 1855, the legislature of that State has power to make laws for the peace, welfare and good government of the State in all cases whatsoever, subject to the Commonwealth Constitution and any limitation in the Act which gave the State its Constitution: section 5 of the New South Wales Constitution. Sections 106 and 107 of the Commonwealth Constitution provide that the New South Wales Constitution shall, subject to the Commonwealth Constitution, continue as at the establishment of the Commonwealth, and that every power of the Parliament of New South Wales shall, unless it is by the Commonwealth Constitution exclusively vested in the Parliament of the Commonwealth or withdrawn from the Parliament of the State, continue as at the establishment of the Commonwealth: *James* v. *Commonwealth of Australia*.[3]

The legislature of New South Wales therefore has power to say in what cases moneys shall be repaid by the appellant to the

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[2] [1955] A.C. 241.

[3] [1936] A.C. 578, 611; 52 T.L.R. 696; [1936] 2 All E.R. 1449.

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respondents, and may exercise that power in a general statute which affects all future cases or in any particular statute. The question is whether that power to declare in what cases the State shall be liable to repay moneys is affected by section 92—whether section 92 deprives the State legislature of the power to say that the Barring Act is the law of New South Wales in this case, power which, apart from section 92, it would certainly have. Section 92 does not confer any new juristic rights—it gives no right of action itself: *Commonwealth of Australia* v. *Bank of New South Wales*[4]; *Hughes and Vale Proprietary Ltd.* v. *State of New South Wales* (*No.* 2)[5]; *James* v. *The Commonwealth*[6]; *James* v. *South Australia.*[7] If section 92 does not give the respondents a right of action it does not affect the Barring Act, and the question then is whether it restricts the legislature's power to alter its law so that under the law of the State the respondents would not have a right of action. It does not so restrict the legislature's power.

The next matter is: can section 92 be construed as requiring that the law of the State shall oblige the appellant to repay money to the respondents if that money has been obtained by it under the authority of a statute which infringes section 92? If it is to be so construed, that is not really different from saying that section 92 gives a right of action. There is no substantial difference between a section which gives a right of action and one which requires that the law of the State shall give such right of action. Every reason which turns against section 92 giving a right of action to recover money which has been paid under an infringing statute turns equally against a construction of section 92 which would lead that section to read that any person who has paid money under an infringing Act must by the law of the State be given a right to recover that money. There can be no implication to that effect.

Section 92 does not crystallize the law of New South Wales so far as that law relates to the recovery of money obtained under the authority of a statute which was invalid. If that is right, it does not prevent the legislature from altering that law, even though the altered law may be less favourable to the respondents. The only other alternative proposition that can be advanced or implication suggested of section 92 which is to restrain the legislature from legislating on the subject-matter of recovering money which has been paid under an infringing Act is that section 92 requires that the State shall not alter its existing law in a matter of this kind with retrospective effect. The appellants' submission on that point is that the State can enact any law prospectively and the same law retrospectively. It is impossible to construe section 92 as requiring that the State shall not alter its law in this matter with retrospective effect. If accepted, that submission would be the end of the case.

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[4] [1950] A.C. 235, 305; 65 T.L.R. 633; [1949] 2 All E.R. 755.

[5] (1955) 93 C.L.R. 127, 217.

[6] (1939) 62 C.L.R. 339, 361.

[7] (1927) 40 C.L.R. 1, 40.

Unless the Constitution requires that a right of action should be given to recover money paid under such a statute, then a law which provides that the money shall not be repayable cannot be regarded as restrictive of the freedom of inter-State trade in a manner forbidden by section 92. If the legislature of New South Wales denies the respondents a right which the Constitution does not require the legislature to give them, it cannot be regarded as imposing a burden. The Barring Act does not impose a burden on anything that is part of, or an essential attribute of, inter-State trade. When the question is whether the State is infringing section 92, if all the State has done is to declare that moneys which have been paid under an invalid statute should not be recovered, the State is producing, it is true, the same financial consequences as if the payment had been valid, but is not doing anything else, and it is doing something which is within its competence. A law which provides that the money paid under the licence shall not be repayable does not purport to make valid a law which forbids persons to engage in inter-State trade.

The authorities show that this Board, following what has been said in the High Court, have laid it down that section 92 gives no right to the citizens except to ignore the infringing law and call upon the judicial power to protect them in resisting action which offends against the section. Section 92 is not infringed by a law of the State which denies the right of action under the law of the State for any act done in reliance on the statute which infringes section 92. It was suggested in the judgment of the High Court that unless there is a limitation on the State's power to destroy causes of action the constitutional remedy in section 92 will be ineffective. The answer to that is that the prohibition in section 92 is not ineffective because under the Australian Constitution Parliament can confer power on the State courts or on the High Court to grant injunctions in the States, and that is the effective way in which it was intended that section 92 should be enforced, and not by actions for damages: Commonwealth Constitution, ss. 75, 76, 77; the Judiciary Act, 1903–1948, ss. 30, 60, 79, 80. If section 92 precludes the States from passing any law which impairs a common law right of action, that would be a serious limitation on the State's legislative power, and a provision of that kind is not to be read lightly into a section which does not say so, and it can hardly have been the intention of the framers of the Constitution.

Section 92 binds the Commonwealth as well as the States. Section 51 (i) of the Constitution gives the Commonwealth power to make laws with respect to trade and commerce. If common law rights cannot be affected by legislation in such a case as this without infringing section 92, then the Commonwealth itself would be precluded from passing any law in this field which would impair common law rights.

The second proposition against the appellants is that legislation affecting the right to recover damages in tort—the right to bring an action for money had and received—would be invalid if the legislation were sufficiently adverse to the inter-State trade to constitute a burden on inter-State trade. That is inconsistent with the proposition that section 92 creates no new juristic rights. Further, denial of the right of action for money had and received imposes no burden on any part of inter-State trade, but on a transaction which forms no part of that trade.

The third proposition against the appellants is that the Barring Act is invalid as an attempt to do indirectly that which section 92 prohibits. The Barring Act, so far as it purports to bar action to recover money paid under an invalid licensing system, does not attempt indirectly to affect that which was held to be unlawful in the *Hughes and Vale* case,[8] namely, the prohibition of inter-State trade. Because the Barring Act produces the same financial effect it is not right to infer that it is an attempt to do indirectly what cannot be done directly. The reasoning in *Deacon* v. *Grimshaw* [9] that the common law action persists because it is preserved by section 92, and that therefore a statute which bars a common law right of action is inconsistent with section 92 construed in that way, is unsound. It was said in *O'Gilpin Ltd.* v. *Commissioner for Road Transport and Tramways (N.S.W.)* [10] that a law may be said to infringe section 92 by imposing a burden. So far as the operation of the present Act is concerned, it does not impose a burden on a transaction which is an essential part of inter-State trade. It imposes a burden on a transaction of recovering money

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[8] [1955] A.C. 241, 281, 300.
[9] (1955) 93 C.L.R. 83, 104.
[10] (1935) 52 C.L.R. 189.

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which had been paid under an invalid licensing system. [Reference was also made to *James* v. *South Australia.*[11]]

This is an important matter in New South Wales. It also concerns all the other States for they have passed similar legislation, although not in precisely the same words.

R. Else-Mitchell Q.C. following. The question is the extent of the prohibition which section 92 imposes. The only legislation which offends against the section is legislation which takes as the criterion of its operation some activity of trade and commerce. As was said in the *Bank* case[12]: "In this labyrinth there is no "golden thread. But it seems that two general propositions "may be accepted: (1) that regulation of trade, commerce and "intercourse among the States is compatible with its absolute "freedom, and (2) that section 92 is violated only when a legis"lative or executive act operates to restrict such trade, commerce "and intercourse directly and immediately as distinct from "creating some indirect or consequential impediment which may "fairly be regarded as remote." The High Court in later cases has treated that approach as the proper one in determining the validity of legislation in the face of section 92. *Hughes and Vale Proprietary Ltd.* v. *State of New South Wales,*[13] *Rex* v. *Vizzard; Ex parte Hill,*[14] where the proper test is formulated, coupled with the way in which the matter was approved in the *Bank* case[15] and the approval the Board gave in the *Hughes and Vale* case[16] to the dissenting judgment of Dixon J. in *McCarter* v. *Brodie,*[17] establishes that section 92 protects the subject only from legislation which takes as its criterion of operation an act or an essential attribute of trade and commerce. In the present case the criterion which is taken by the Barring Act is not of itself trade and commerce or an essential attribute of it, but is a common law cause of action the individual has as a consequence of having carried on trade and commerce. The Barring Act operates merely on the cause of action and not on an activity of trade and commerce. The respondents' causes of action are in no sense part of their trade and equipment in the sense in which the vehicles they used were.

Sir Garfield Barwick Q.C., *J. D. Holmes Q.C.* (both of Australia), *R. A. Gatehouse* and *A. J. Rogers* (Australia) for the respondents. *O'Gilpin's* case[18] has never been expressly approved by this Board. The question is, how does the law in question

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[11] 40 C.L.R. 1, 35.

[12] [1950] A.C. 235, 310.

[13] (1953) 87 C.L.R. 49, 97.

[14] (1933) 50 C.L.R. 30, 60.

[15] [1950] A.C. 235.

[16] [1955] A.C. 241, 296.

[17] (1950) 80 C.L.R. 432, 465.

[18] 52 C.L.R. 189.

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MOTOR TRANSPORT COMMISSIONER
v.
ANTILL RANGER & CO. PTY. LTD.
STATE OF NEW SOUTH WALES
v.
EDMUND T. LENNON PTY. LTD.

operate, does it operate to render trade unfree? The appellants say that to confiscate the property of the trader because he has traded is not to burden him in his trade. It is submitted that one cannot do that and at the same moment assert that he was free in his trade.

The appellants' contention is that the Barring Act is valid because the State has plenary power to make laws with respect to the circumstances in which money shall be repayable, inter alia, by the State to citizens. They claim that this plenary power is unaffected by section 92 in any relevant respect. The respondents say that it is wrong to talk about section 92 requiring something; it is largely a negative provision; it does not require something to be done, it prevents its being done. The plenary power is subject to diminution by the very existence of section 92. [*James* v. *Cowan*,[19] *Rex* v. *Vizzard*[20] and the *Bank* case[21] were referred to.] The first operation of section 92 was to avoid such part of the existing system of law as was inconsistent with the guaranteed freedom: so much of the system of law as existed in 1900 as was compatible with the guaranteed freedom and relevant to its maintenance and enjoyment became unsusceptible of change in any manner which was inconsistent with that freedom. If the maintenance and enjoyment of the freedom required the continuance of those rights and remedies section 92 avoids any attempt at alteration which would deny such rights and remedies. The continuance of those rights is indispensable to the maintenance of freedom. There can be no injunction unless there be breach of a substantive right. The material sections of the Barring Act would be just as bad if put in the original Act of 1931. The Barring Act precludes the cause of action arising. That is doing indirectly what cannot be done directly. It is not compatible with the guaranteed freedom that a trader's property may be confiscated, admittedly ex post facto, for having traded.

[He was stopped.]

July 10. The judgment of their Lordships was delivered by VISCOUNT SIMONDS. These consolidated appeals raise a question of novelty and importance in regard to the operation and effect of section 92 of the Commonwealth of Australia Constitution, but having heard full argument on behalf of the appellants their Lordships have no doubt that the conclusions of the High Court are right and their reasons unimpeachable.

[19] [1932] A.C. 542, 560; 48 T.L.R. 564.

[20] 50 C.L.R. 30, 60.

[21] [1950] A.C. 235, 304–306.

Section 92 provides that, on the imposition of uniform duties of customs, trade, commerce and intercourse among the States, whether by means of internal carriage or ocean navigation, shall be absolutely free.

In *Hughes and Vale Pty. Ltd.* v. *State of New South Wales* [1] their Lordships decided that the provisions of the State Transport (Co-ordination) Act, 1931–1951, of the State of New South Wales (sometimes called " the principal Act "), which required application to be made for a licence and all provisions consequential thereon, in so far as they purported to apply to, and to the operators of, public motor-vehicles operated in the course of and for the purposes of inter-State trade were invalid as contravening section 92. The effect of that decision was that charges which under the Act had been imposed upon and collected from the respondents had been unlawfully imposed and collected. The respondents accordingly commenced proceedings for the recovery of the sums so paid by them, and for the purpose of these appeals it is to be assumed, for the reasons elaborated in the judgment of the High Court, that they would have had a good cause of action but for the Act to which reference is next made. It is not material to the result, but may be observed that the respondents in the first of the consolidated appeals commenced proceedings before that Act was passed.

The State Transport Co-ordination (Barring of Claims and Remedies) Act, 1954 (which will be referred to as " the Barring " Act "), upon which the appellants rely, enacted, so far as material, as follows. [His Lordship referred to sections 3, 4 and 5 of the Act and continued :] There can be no doubt that this Act, if it is valid, is a complete answer to the respondents' claims. It is invalid only if it is struck by section 92 of the Constitution. This is the issue, and their Lordships concur in the unanimous opinion of the High Court that section 92 precludes the appellants from relying on it.

It was conceded by the appellants that the validity of the relevant provisions of the Barring Act would have been no greater and no less if they had been contained in the principal Act itself. Neither prospectively nor retrospectively (to use the words of Fullagar J.) can a State law make lawful that which the Constitution says is unlawful. A simple test thus appears to be afforded. For if a statute enacted that charges in respect of inter-State trade should be imposed and that, if they were held to be illegally imposed and collected, they should nevertheless be retained, such an enactment could not be challenged if the illegality of the charge rested only on the then existing State law. As their Lordships were often reminded in the course of the argument, the State is sovereign within its own territory. But it is otherwise if the illegality arises out of a provision of the Constitution itself. Then the question is whether the statutory immunity accorded to illegal acts is not as offensive to the Constitution as the illegal acts themselves, and, applied to the present circumstances, that question is whether, if the imposition of charges in respect of inter-State trade is invalid as an offence against section 92, it is not equally an offence to deny the right to recover them after they have been unlawfully exacted.

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[1] [1955] A.C. 241.

It appears to their Lordships that to this question there can be only one answer. It cannot be too strongly emphasized or too often repeated that, in the words of the High Court, the immunity given by section 92 to trade, commerce and intercourse cannot be transient or illusory. Yet how fugitive would that protection be if effect were given to the argument of the appellants in this case. A trader desiring to engage in inter-State trade and confronted with the provisions of an Act which appear to him to deprive him of the freedom guaranteed by the Constitution may well be content to conform to its requirements, to accept the necessity of applying for licences and to submit, though it may be under protest, to pecuniary exactions in order that he may be able to carry on his business. But he may do so in the firm conviction that he can test the legality of the statutory requirements in a court of law and recover sums of money unlawfully exacted. And let it be supposed that he is right and that those sums were unlawfully exacted and that he can avail himself of the constitutional freedom afforded by section 92. What is his situation if then he finds himself by a later provision of the same Act or by a subsequent Act once more subjected to the same exactions? The burden on his trade remains just what it was: the freedom of his trade has been in the same degree impaired. In letter and in spirit section 92 is in the same measure defeated.

The appellants called in aid the well-known passage from the judgment of Dixon J. (as he then was) in *James* v. *The Commonwealth*,[2] which was echoed in the judgment of the Board in the *Bank* case,[3] to the effect that juristically section 92 does not

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[2] (1939) 62 C.L.R. 339, 361.

[3] [1950] A.C. 235, 305.

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confer private rights upon individuals. But it is a transparent misuse of this proposition to proceed to the further proposition that a trader, who but for the Barring Act would have a right enforceable at common law, cannot plead that a defence raised under that Act is precluded by the section. In such a case the trader does precisely what this Board has said he may do. He invokes the judicial power to help him to resist legislative action which offends against the section. He assumedly has a common law right to recover money unlawfully exacted and he demurs to a plea founded on a statute which offends against section 92. The demurrer must prevail.

The same argument was advanced in a somewhat different form by counsel who urged that the effect of the Barring Act was not to impose a burden on trade but only (as their Lordships understood the argument) to interfere with a right of property, viz., the right to sue for money had and received, which accrued after the trading operation was concluded. In this form the argument has no greater validity. It has become a truism that section 92 protects the subject only from legislation which takes as its criterion of operation an act of trade or commerce or an essential attribute of trade or commerce. This is a proposition couched in necessarily vague and general terms. To exclude from its scope an enactment whose only object is to validate an exaction which the section renders unlawful would, in their Lordships' opinion, be a mockery of the spirit of the Constitution.

Their Lordships do not think it desirable to deal at greater length with these appeals, important as are the issues they raise, because they agree so fully with the judgments immediately under review and with that of Fullagar J. in *Deacon* v. *Grimshaw*.[4]

Their Lordships will accordingly humbly advise Her Majesty that these appeals should be dismissed. The appellants will pay the respondents' costs of the appeals.

Solicitors: *Light & Fulton; Baileys, Shaw & Gillett.*

C. C.

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[4] (1955) 93 C.L.R. 83, 104.

PATIENCE KASUMU AND OTHERS . . . APPELLANTS; J. C.*

AND 1956

GBADAMOSI BABA-EGBE . . . . RESPONDENT. *July* 17.

ON APPEAL FROM THE WEST AFRICAN COURT OF APPEAL.

Moneylender—Non-compliance with statutory requirements—Unenforceable transaction—Loan—Security by way of mortgage of property—Borrower entitled to recover possession of property without repaying outstanding balance of loan—"Not be entitled to enforce any "claim in respect of any transaction"—Construction—Moneylenders Ordinance (Consolidated Ordinances of Nigeria, c. 136), *s.* 19.
West Africa—Nigeria.

The respondent mortgaged certain leasehold land to a licensed moneylender (of whose estate the appellants were the administrators) as security for a loan. The moneylender had admittedly kept no book recording the transaction as required by section 19 of the Moneylenders Ordinance of Nigeria and the transaction was therefore unenforceable under that section. The respondent having instituted proceedings claiming redemption of the property and recovery of possession:—

Held, that the principle of *Lodge* v. *National Union Investment Co. Ltd.* [1907] 1 Ch. 300; 23 T.L.R. 187 that a borrower, as a condition of being granted relief in the form of delivery up of securities (where the transaction was illegal), must repay such of the money borrowed as was still outstanding, was not applicable in the case of a transaction declared to be unenforceable by section 19 of the Moneylenders Ordinance. The Ordinance, in enacting that no loan which failed to satisfy the statutory requirements was to be enforced, meant that no court of law was to recognize the lender as having a right at law to get his money back. If the court were to impose terms of repayment as a condition of making any order for relief it would be expressing a policy of its own in regard to such a transaction which was in direct conflict with the policy of the Ordinance. Accordingly, the respondent was entitled to possession, cancellation of the mortgage and delivery up of the cancelled deeds and the title deeds of the property without being obliged to repay the outstanding balance of the loan.

Cohen v. *Lester (J.) Ltd.* [1939] 1 K.B. 504; [1938] 4 All E.R. 188 and *Chapman* v. *Michaelson* [1908] 2 Ch. 612; 24 T.L.R. 795; *affd.* [1909] 1 Ch. 238; 25 T.L.R. 101 (C.A.) considered.

The words of deprivation in section 19 (4), "not be entitled to "enforce any claim in respect of any transaction" were very widely drawn and were not to be confined to the assertion of rights by means of or in the course of legal proceedings. The performance of such acts in the law as the exercise of a right of sale over property mortgaged or charged or the retention or taking possession of such property in assertion of the claim to repayment, was also precluded.

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* *Present*: LORD RADCLIFFE, LORD COHEN, LORD SOMERVELL OF HARROW.

Judgment of the West African Court of Appeal affirmed.

APPEAL (No. 9 of 1955) from a judgment of the West African Court of Appeal (February 22, 1954) allowing an appeal from a judgment of the Supreme Court of Nigeria (February 26, 1952) in consolidated suits.

The following facts are taken from the judgment of the Judicial Committee: The respondent held a building lease of some land known as No. 55, Great Bridge Street, Lagos, and on August 22, 1945, he executed a deed of mortgage in favour of Kasumu, a licensed moneylender, by which deed he assigned the leasehold premises as security for the sum of £2,000 acknowledged to have been paid to the borrower at the time of the mortgage, with interest at the rate of 15 per cent. until repayment. Kasumu went into possession of the premises in September, 1946, and thereafter possession or receipt of rents and profits was retained by him and after his death by the appellants, the administrators of his estate.

On February 14, 1950, the respondent instituted proceedings in the Supreme Court of Nigeria, claiming redemption of the premises or, alternatively, a declaration that the mortgage was void: an account of rents and profits received: and recovery of possession. He was met by a cross-action on the part of the appellants, the purpose of which was to set up a claim that there had been an agreement made between Kasumu and the respondent within a few months of the making of the mortgage, by virtue of which the respondent had undertaken to convey his equity of redemption to Kasumu, and to ask the court for an order that this agreement should be specifically performed. The two actions were consolidated and now formed one set of proceedings.

The Supreme Court of Nigeria (Rhodes J.) ordered that the respondent was to exercise his equity of redemption and recover the premises after an account had been taken to determine what was actually owing by him on the mortgage and paid off to the estate of the moneylender. After an account had been taken Gregg J. gave judgment for the appellants for £1,541 2s. 6d. and interest.

On appeal, the West African Court of Appeal (Sutton P., Verity C.J. (Nigeria) and Coussey J.A.), in a judgment delivered by Coussey J.A., substituted for the judges' orders a declaration that the mortgage transaction, not having been recorded in a book as required by section 19 of the Moneylenders Ordinance of Nigeria, was unenforceable; an order that the appellants should deliver possession of the premises to the respondent; cancellation of the mortgage and delivery up of the cancelled deeds and the title deeds of the premises.

The question in this appeal was whether as a condition of the relief which he claimed the respondent should be compelled to repay to the appellants so much of the money lent as was still owing, with interest.

1956. June 25, 26. *Phineas Quass Q.C.* and *R. K. Handoo* for the appellants. The question is whether the respondent could properly be put on terms for getting back his land from the mortgagee who had gone into possession. The Court of Appeal said that the trial judge was wrong to insist on terms, and that the respondent could have his property back without paying a penny piece of the outstanding loan. Section 19 of the Moneylenders Ordinance provides that every moneylender shall keep a book in which he shall enter specified details in connexion with every loan, and by section 19 (4): " Any moneylender who fails " to comply with any of the requirements of this section shall not " be entitled to enforce any claim in respect of any transaction " in relation to which the default shall have been made." That means that the contract is not void, but he cannot enforce any claim in respect of it. There is no section like this in the English Moneylenders Act. The appellants say that, whether the claim is enforceable or not, they were in possession of the land and a court of equity would say to the respondent that he who seeks equity must do equity and put him on terms. Further, a court of equity would tell the respondent that if he asks for relief he must do what the court thinks is right, the terms being a matter for the court.

There is a conflict between two English cases, the second, *Cohen* v. *Lester (J.) Ltd.*,[1] distinguished the first, *Lodge* v. *National Union Investment Co. Ltd.*,[2] on the ground that the contract in the first was an illegal one, whereas in *Cohen's* case [3] it was in the judge's opinion an unenforceable one. The Nigerian Ordinance is undoubtedly founded on the English Moneylenders Act of 1927, save that there is no English equivalent of section 19 of the Ordinance. It is the very basis of the appellants' submission that "unenforceable" in section 19 means nothing more than unenforceable by action. A distinction must be drawn between a contract which is unenforceable and one which is void. It is difficult to draw a distinction between a contract which is illegal and one which is void. [*In re Chetwynd's Estate, Dunn's Trust Ltd.* v. *Brown*[4] was referred to.]

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[1] [1939] 1 K.B. 504; [1938] 4 All E.R. 188.

[2] [1907] 1 Ch. 300; 23 T.L.R. 187.

[3] [1939] 1 K.B. 504.

With regard to the authorities, *Bonnard* v. *Dott*,[5] a decision under the Moneylenders Act of 1900, is not in the appellants' favour, but it is not against them. The next case, *Lodge's* case,[6] should, it is submitted, have concluded *Cohen's* case[7] in favour of the moneylender, and should have concluded the present case in favour of the view for which the appellants are contending. It is not said that the respondent should be given exactly the same terms as though the contract was enforceable, but that the borrower should not be allowed to retake his security except on terms which the court thinks reasonable. If a moneylender can enter into an illegal contract and still get his money back, a fortiori where there is merely an unenforceable contract. *Lodge's* case[6] is mentioned and distinguished in *Chapman* v. *Michaelson*,[8] a decision of Eve J. which was affirmed by the Court of Appeal[9]; there is nothing in that case to throw any doubt on the judgment in *Lodge's* case,[10] and there appears to be no case in the 49 years since it was decided in which it has been doubted. With regard to *Cohen's* case,[11] it is difficult to see why the position should be any different if there is an unenforceable contract than if it is a void contract. It has never been suggested that the borrower is in pari delicto with the moneylender. *Egan* v. *Langham Investments Ltd.*,[12] to which Tucker J. referred in *Cohen's* case,[13] is somewhat against the appellants' contention. *Lodge's* case[14] was not cited in *Central Advance and Discount Corporation Ltd.* v. *Marshall*,[15] though it was referred to in three other cases, but not on this particular point: *In re Jubilee Cotton Mills Ltd.*,[16] *In re Mason*[17] and *Sinclair* v. *Brougham*.[18]

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[4] [1938] 1 Ch. 13, 16; 53 T.L.R. 917; [1937] 3 All E.R. 530.

[5] [1906] 1 Ch. 740; 22 T.L.R. 399.

[6] [1907] 1 Ch. 300.

[7] [1939] 1 K.B. 504.

[8] [1908] 2 Ch. 612; 24 T.L.R. 795.

[9] [1909] 1 Ch. 238; 25 T.L.R. 101.

[10] [1907] 1 Ch. 300.

[11] [1939] 1 K.B. 504.

[12] [1938] 1 K.B. 667; 54 T.L.R. 268; [1938] 1 All E.R. 193.

[13] [1939] 1 K.B. 504.

[14] [1907] 1 Ch. 300.

[15] [1939] 2 K.B. 781; 55 T.L.R. 1015; [1939] 3 All E.R. 695.

On the meaning of "enforceable," see *Parkfield Trust Ltd.* v. *Dent*.[19] Section 19 does not say "shall not be entitled to "enforce any security"; it could easily have said that. There is no reason for interpreting section 19 as a penal section. [*Direct U.S. Cable Co.* v. *Western Union Telegraph Co.*[20] was referred to.] There can be no justification whatever for saying that if the respondent is asking for equitable relief he should not be put on terms; the case was argued on the basis that he was asking for such relief. He is directly within *Lodge's* case.[21] It would seem that that case and *Cohen's* case[22] cannot really stand together. The West African Court of Appeal were wrong in holding that the respondent should not be put on terms.

John Pennycuick Q.C. and *Arthur Bagnall* for the respondent. Section 19 of the Moneylenders Ordinance precludes a moneylender who fails to comply with any of its requirements from giving effect to his claim in any manner. "Enforce" is capable of a certain variety of meaning according to its context, but in this context it can only mean put in force or give effect to in the wide sense of precluding the moneylender from pursuing any method of obtaining satisfaction of his rights. Section 19 has this effect: that the moneylender who fails to comply with the requirements of the section is precluded from putting in force or giving effect to his secured debt by any means whether by action or out of court by the methods by which mortgages are most commonly enforced. If that is the true view, then it necessarily follows that a moneylender, if in possession, is not entitled to remain in possession of the mortgaged premises. The reasoning of Tucker J. in *Cohen's* case[23] is adopted. The contract here having become unenforceable, the moneylender has no right or title to retain the mortgaged property. Once it is established that the statute prohibits enforcement of a mortgage contract by any means, then it is a matter of complete indifference whether the jurisdiction to which the borrower has to appeal in order to get his mortgaged property back is that of equity or of the common law, because the court of equity no less than the court of common law must bow to the statutory provision—as the Court of Appeal below quoted: "The statute is like a tyrant; when he comes "he makes all void." The statutory provision overrides such maxims as "he who seeks equity must do equity." A court of equity has no jurisdiction to impose conditions on a person who seeks rights under statute.

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[16] [1922] 1 Ch. 100, 119; 38 T.L.R. 891.

[17] [1928] Ch. 385, 393; 44 T.L.R. 225.

[18] [1914] A.C. 398, 456; 30 T.L.R. 315.

[19] [1931] 2 K.B. 579, 581.

[20] [1921] 1 Ch. 370, 383; 36 T.L.R. 402.

[21] [1907] 1 Ch. 300.

[22] [1939] 1 K.B. 504.

[23] Ibid.

In *Lodge's* case [24] the parties were in pari delicto and therefore the borrower could only invoke the assistance of the court, if at all, on terms. In the present case there is nothing to prevent the respondent recovering his property free from any conditions; that is the policy of the Ordinance. The plain meaning of *Bonnard* v. *Dott* [25] is that *Lodge's* case [26] is wrongly decided, and the Board is asked to say that that is so. The true view of the present Ordinance is that it was directed entirely against the moneylender, its purpose and effect being to provide that if he did not comply strictly with its provisions all his rights should come to an end. If that is so, it necessarily follows that the borrower would be entitled to recover his property free from any fetter in favour of the moneylender, and an attempt to apply equitable maxims would defeat the purposes of the statute.

Phineas Quass Q.C. in reply. The *Lodge* [26] and *Cohen* [27] cases cannot stand together. In *Bonnard* v. *Dott* [28] the Court of Appeal really came to no conclusion on whether terms could be imposed. Section 19 cannot have the very wide meaning the respondent seeks to attach to it. [Reference was made to *Victorian Daylesford Syndicate Ltd.* v. *Dott.*[29]]

July 17. The judgment of their Lordships was delivered by LORD RADCLIFFE.

This appeal from a judgment and order of the West African Court of Appeal dated February 22, 1954, arises out of a suit relating to a moneylending transaction between one C. O. Kasumu, deceased, of whose estate the appellants are the administrators, and the respondent, who was the borrower in the transaction and the plaintiff in the resulting suit. The only question which is at issue in the appeal is whether the order of the Court of Appeal which granted the respondent relief against the transaction in the form of an order for repossession of mortgaged premises and delivery up of the mortgage deed and its accompanying title deeds ought to have been made subject to a condition of relief that he should undertake to pay back so much of the money lent as was still owing, with or without some interest.

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[24] [1907] 1 Ch. 300.
[25] [1906] 1 Ch. 740.
[26] [1907] 1 Ch. 300.
[27] [1939] 1 K.B. 504.
[28] [1906] 1 Ch. 740.
[29] [1905] 2 Ch. 624; 21 T.L.R. 742.

There is no material point of fact which is now in dispute. [His Lordship stated the facts as set out above and continued:] The alleged agreement to assign the equity to Kasumu has dropped out of the picture. The trial judge held that it was unenforceable and that there was "no effective sale." The respondent's claim that the mortgage was void does not seem to have been supported by any facts deposed to by himself or any other witness called by him, nor is it possible to say to what contention of law it was intended to be directed. The case would have remained simply a redemption action against mortgagees in possession had it not appeared on the face of the pleadings of both parties that Kasumu had committed a breach of section 19 of the Moneylenders Ordinance (Consolidated Ordinances of Nigeria, c.136) at the time of making his loan or instalments of loan to the respondent.

The introduction of this point came about somewhat accidentally. The respondent in his statement of claim made the statement that Kasumu had kept no book in which the principal amount advanced had been recorded (a duty which section 19 imposes upon a moneylender) and that because of this the appellants were assuming, wrongly as he claimed, that the full £2,000 had been advanced. He did not otherwise make any complaint of the absence of record. The appellants, on the other hand, explicitly admitted that no book recorded the amount of the principal advanced, but denied that their assumption that £2,000 had actually been advanced was a mistaken one. It is sufficient, however, that the breach of section 19 was brought to the attention of the judge. It became his duty to give it such effect upon the rights of the parties as the law required. Indeed, it is plain from the terms of his judgment that the respondent's counsel had raised the point in the course of the hearing and had argued "that Kasumu was a moneylender and kept no books as "required by our local Ordinance, therefore he cannot enforce "his mortgage."

The judge did not give effect to this submission in any way, though it is not possible to find in his judgment the process of reasoning which led him to treat it as having no bearing on the form of his order. The order that he made was one for redemption and recovery of the property after an account had been taken of what was due on the mortgage. The account was taken and a subsequent order entered judgment for the appellants for

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£1,541 2s. 6d. and interest. These orders were reversed by the Court of Appeal, who substituted for them a declaration that the mortgage transaction was unenforceable: an order that the appellants should deliver possession of the premises to the respondent; cancellation of the mortgage and delivery up of the cancelled deeds and the title deeds of the premises.

Thus, on one view of the rights of the parties, the respondent gets the mortgaged property back on paying up the balance of moneys outstanding on the loan together with interest: on the other view, he gets it back without being obliged to pay up any money at all, even on the basis that there is as much as the £1,541 outstanding.

At this stage it is convenient to set out the material portions of section 19 of the Moneylenders Ordinance. They are as follows:—" (2) Every moneylender shall keep a book (which " shall be securely bound and paged so that leaves cannot be " removed or inserted without apparent damage) in which he " shall enter in connexion with every loan made by him (a) the " date on which the loan was made; (b) the amount of the " principal; (c) the rate of interest; (d) all sums received in " respect of the loan or the interest thereon, with the date of " payment thereof, and shall produce such book when required " to do so by any court. (3) The entries in the said book shall " be made forthwith on the making of the loan or the receipt of " sums paid in respect thereof as the case may be. (4) Any " moneylender who fails to comply with any of the requirements " of this section shall not be entitled to enforce any claim in " respect of any transaction in relation to which the default shall " have been made. He shall also be guilty of an offence under " this Ordinance and shall be liable on conviction to a fine of ten " pounds or in the case of a continuing offence to a fine of five " pounds for each day or part of a day during which such offence " continues."

One or two preliminary observations may be made with regard to this section. It was not in dispute that the effect of it was that a defaulting moneylender not only incurs a monetary penalty for his offence but also loses any right to take legal proceedings to recover the money he has lent. So far as legal rights of action go he loses his money. Secondly, their Lordships are satisfied that the words of deprivation " not be entitled to enforce any " claim in respect of any transaction " are very widely drawn and that they should not be confined to the assertion of rights by means of or in the course of legal proceedings. Thus the performance of such acts in the law as the exercise of a right of sale over property mortgaged or charged or the retention or taking possession of such property in assertion of the claim to repayment is also precluded. Finally, section 19 is only one of a comprehensive set of provisions contained in the Ordinance which regulate the conditions under which moneylending can be carried on in Nigeria and the permitted effects of moneylending transactions. These provisions reproduce many of the sections of the current Moneylenders Act of the United Kingdom, the Moneylenders Act, 1927, though section 19 itself has no counterpart in that Act, and the scheme of the Ordinance is largely modelled on the legislation of the United Kingdom. It does not appear that the Nigerian courts have laid down any principles of their own in the interpretation of the Ordinance and the decision of the Court of Appeal which is now under appeal consists essentially of a weighing of the authority of *Lodge* v. *National Union Investment Co. Ltd.*[1] against that of *Cohen* v. *Lester (J.) Ltd.*[2]

The appellants' case is that, following the decision in *Lodge's* case[3] the court ought not to have made any order by way of giving relief to the respondent without putting him on terms as to repayment of such of the money borrowed as was still outstanding. And it is undoubtedly true that in that case Parker J. did require such terms from a borrower as a condition of granting him relief in the form of delivery up of securities, the moneylending transaction in question being an illegal contract by virtue of the non-registration of the lender under the Moneylenders Act, 1900. But it is also true that in *Cohen* v. *Lester (J.) Ltd.*[4] Tucker J. refused to impose any terms as to repayment when making an order for the return of a pledged chattel at the instance of a borrower, the contract and security being in that case rendered unenforceable by virtue of the Moneylenders Act, 1927, section 6. The distinction exists between the respective circumstances of the two cases that one involved an illegal and the other an unenforceable contract: but, although this may to some extent account for the course of reasoning that led to the respective decisions, it is not inherently satisfactory that the law should accord to the moneylender who has committed an offence and made an illegal contract more favourable treatment than one who has done no more than enter into an unenforceable bargain. It is necessary for their Lordships, therefore, to ascertain clearly what principle is involved in the decision of *Lodge's* case [5] and then to decide whether that principle is capable of being applied consistently with the policy of the legislature shown by such an enactment as section 19 of the Ordinance.

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[1] [1907] 1 Ch. 300; 23 T.L.R. 187.

[2] [1939] 1 K.B. 504; [1938] 4 All E.R. 188.

[3] [1907] 1 Ch. 300.

[4] [1939] 1 K.B. 504.

There are two main lines of reasoning to be found in Parker J.'s decision. Starting from the principle that the loan constituted an illegal transaction to which the plaintiff had made himself a party, he concluded that he ought to treat him as one who could only take advantage of the illegality by submitting to do whatever the court considered fair to the defendant. His approach to the matter was governed by his view that the former statutes against usury with their prohibition of usurious contracts produced the same sort of situation as that produced by the Moneylenders Act, 1900, when an unregistered moneylender lends money, and he followed therefore the line of certain old decisions in the courts of equity and common law in which plaintiffs had not been permitted to take advantage of contracts being " utterly void " under the Usury Acts and recover their securities without repaying money due. Even so, it is apparent from Parker J.'s careful citation of the earlier cases that the practice in the courts of common law was by no means uniform in this matter and that there had been differences of view between the Court of Common Pleas on the one hand and the Court of King's Bench on the other. Indeed, their Lordships find it very difficult to base any principle upon the conception that the borrower under a contract tainted with usury was himself tainted with the illegality that avoided the transaction and so stood to some extent " in mercy " when resorting to the courts to claim the relief which would seem to have been his right if the contract itself was rendered void. There is nothing in any of the main Acts, 37 Hen. 8, c. 9, 12 Car. 2, c. 13, and 12 Ann. c. 16, which suggests that the victim of usury was in any sense an offending party. Indeed, so little was this so that the courts did not even preclude him from recovering, as informer, his share of the triple penalty imposed. However that may be, it does become virtually impossible to transfer that principle to such cases as arise under the current legislation which regulates moneylending when the illegality that avoids the contract or the breach of duty that renders it unenforceable is produced by the act or negligence of the moneylender himself, and has nothing whatever to do with the inherent nature of the contract into which the borrower has entered. And section 19 deals with one of those cases. It was not the fault of the respondent that Kasumu did not keep his books properly.

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[5] [1907] 1 Ch. 300.

But it is evident that there was another line of argument that weighed with Parker J., and it is perhaps an easier one to support. The plaintiff before him was asking for equitable relief, and it is a basic principle of equity that he who seeks it must do it. Was it proper, then, for a court of equity to place its power of making orders at the disposal of the plaintiff without requiring him to submit to the condition of doing the honest thing and repaying the money he owed? This principle at least had an established position in the practice of the courts of equity when relieving against usurious contracts: and it is noticeable that, when the subject is treated by Comyn in his book on Usury (see pp. 207–212) and by Story in his Equity Jurisprudence (see sections 300, 301), the court's imposition of terms is based squarely on this rule and not upon the more artificial conception that the borrower is an accessory to the lender's offence. "While, however, the courts protect the borrower they will be careful to "observe that when he seeks relief he does not himself become "the oppressor," says Comyn. This is a persuasive way of putting the matter: but it is exposed to the criticism that it was not so much the courts who were protecting the borrower as the Act of Parliament which made the contract "utterly void." If the courts impose upon themselves the obligation of protecting the lender while the Act protects the borrower they may find themselves in the difficulty that they are in effect reversing the Act of Parliament in their endeavour to achieve a truly equitable solution.

Lodge's case [6] was a decision of a great equity lawyer and it has stood as a decision since the year 1906. Nevertheless, it cannot be treated as having established any wide general principle that governs the action of courts in granting relief in moneylending cases. In *Chapman* v. *Michaelson* [7] Eve J. refused to put the representative of a borrower upon any terms as to repayment when granting a declaration that a loan was illegal and void by virtue of section 2 of the Moneylenders Act, 1900. His decision was unanimously upheld by the Court of Appeal.[8] Thus, in a court of equity a borrower relying on the contract being illegal obtained the relief against the lender that he chose to

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[6] [1907] 1 Ch. 300.

[7] [1908] 2 Ch. 612; 24 T.L.R. 795.

[8] [1909] 1 Ch. 238; 25 T.L.R. 101.

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ask for without being required to make any offer to pay the outstanding moneys. The plaintiff was in fact the borrower's trustee in bankruptcy, but this circumstance was not treated as having any special bearing on the result. Both courts distinguished *Lodge's* case,[9] Eve J. on the ground that the declaration which he was making was not "in the nature of equitable relief," the Court of Appeal on the ground that it was not "equitable "relief" or "true equitable relief." It must be admitted that, now that all courts endeavour to give effect to the rules of both systems with predominance for equity in the case of conflict, a distinction which is based entirely on the nature or history of the remedy sought does not seem a very satisfactory basis for a material difference in the resulting positions of lender and borrower. No doubt a court of equity, operating in personam, could produce remedies for the return or cancellation of instruments of value where the common law remedies of trover and detinue did not lie: but the purpose of all such proceedings is the same, to restore the borrower to the position he occupied before the void or unenforceable transaction.

The effect of *Cohen* v. *Lester* (*J.*) *Ltd.*[10] has already been stated. It is evident from what is said in the judgment in that case that it would be in accordance with prevailing practice for a court dealing with loans rendered unenforceable by the Moneylenders Act to make an order for the lender to surrender securities without imposing terms as to repayment.

It remains for their Lordships to consider whether the principle of *Lodge's* case[11] ought to be applied in the case of a transaction declared to be unenforceable by section 19 of the Nigerian Ordinance. In their opinion it should not. If it were, the result would be that a lender who, while offending against the Ordinance, had fortified himself by taking any sort of security would be put by the courts in a position altogether more favourable than a similar lender who had taken no security for his loan. For any lender who by taking security had put himself in the position that his borrower would have to resort to the court in order completely to undo the effect of the transaction would be protected by the court from parting with his security except on terms that rendered the unenforceable loan enforceable, either to its full effect or in some modified terms. Yet the lender who had taken no security would lose any right to recover his money, as the Ordinance clearly intended. Not only would it seem anomalous for the court to bring about a distinction of this sort between loans each of which equally offends the statute, but it would also be wrong that a lender in default should be allowed to defend himself in court by calling for the imposition of terms of repayment, for by so doing he would be enforcing, directly or indirectly, "a claim in respect of the transaction."

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[9] [1907] 1 Ch. 300.

[10] [1939] 1 K.B. 504.

[11] [1907] 1 Ch. 300.

In their Lordships' opinion it is not possible to transfer the principle which guided the courts in dealing with claims based on the Usury Acts to claims for relief arising out of transactions rendered void or unenforceable under the system of regulation which is contained in the Moneylenders Act. For in most respects the purpose of the two sets of Acts is essentially different. According to medieval ideas the taking of usury involved the sin of avarice. It was not the lending of money or the circumstances under which it was lent that were the material matter, but the obtaining of profit from the use of money. When medieval conceptions began gradually to give way before the impulse of commercial and industrial activity, the sin of avarice turned into the offence of usury: but the usury prohibited was no longer the lending of money at profit but the lending of money at a rate of profit greater than that permitted by the statute. What the law penalized and made void was a particular kind of grasping contract: and it was evidently felt by equity judges at any rate that they were doing nothing that contravened the policy of the Acts if they insisted that the price of their remedies should be the return of the principal money and a reasonable rate of interest, so long as no effect was given to those elements of the loan in which the usury itself consisted.

But the Usury Acts disappeared in 1854, and much of the Moneylenders Act, 1900, and the Moneylenders Act, 1927, is directed to enforcing measures of control that have no concern with the intrinsic nature of the contract made. Such requirements as that the moneylender must be registered or licensed, must use his authorized name, must procure a note or memorandum of the contract signed personally by the borrower, must keep a book in which is entered a contemporary record of the transaction, strike indifferently at all moneylender's loans, however moderate the terms of any particular transaction. When the governing statute enacts that no loan which fails to satisfy any of these requirements is to be enforceable it must be taken to mean what it says, that no court of law is to recognize the lender as having a right at law to get his money back. That is part of the penalty which the statute imposes.

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There is no room to reform the terms of the loan, since the statute is not concerned with the vice of its content but with the vice of the conditions under which it was made. The provisions of section 19 are not purposeless: they seem to assume that no loan that is not contemporaneously recorded can be established with sufficient certainty to be recognized at law. If a court therefore were to impose terms of repayment as a condition of making any order for relief it would be expressing a policy of its own in regard to such transactions which is in direct conflict with the policy of the Acts themselves. In their Lordships' opinion the court should not place itself in such a position.

For these reasons their Lordships will humbly advise Her Majesty that the decision of the West African Court of Appeal in this case was correct and that the appeal should be dismissed. The appellants must pay the respondent's costs.

Solicitors: *T. L. Wilson & Co.; Hatchett Jones & Co.*

C. C.

[HOUSE OF LORDS.]

H. L. (E.)*
1955
Dec. 5, 6, 7, 8.
1956
Jan. 31.

MORRIS . . . . APPELLANT;

AND

WEST HARTLEPOOL STEAM NAVIGATION CO. LTD. . . . . RESPONDENT.

Negligence—Safe system of work—General practice—Ship—Open hold—Guard-rails not erected—Injury to seaman.

In a grain ship at sea, after each hold had been made ready to load, the upper deck hatches were battened down, completely isolating that section of the ship, but the 'tween deck hatch covers were left off and no guard-rail was erected round the hatchway. Timber was stored in the 'tween decks leaving a space about 12 feet broad beside the hatchway. A seaman sent down to fetch some timber from the 'tween decks fell 40 feet into the hold for some unexplained cause. There was evidence that on this ship it was quite usual for men to be sent down to the 'tween decks after the making ready of the holds had been completed and the deck hatches had been battened down. In an action by the seaman against the shipowners, alleging negligence on their part as the cause of his injury, they relied on evidence to suggest that there was a general practice in ships at sea not to erect guard-rails in similar circumstances:—

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* *Present*: LORD MORTON OF HENRYTON, LORD PORTER, LORD REID, LORD TUCKER and LORD COHEN.

Held (Lord Morton of Henryton and Lord Porter dissenting), that the shipowners had been proved to be in breach of their common law duty to the seaman.

Test laid down by Lord Normand in *Paris* v. *Stepney Borough Council* [1951] A.C. 367, 382; [1951] 1 T.L.R. 25; [1951] 1 All E.R. 42 applied.

Decision of the Court of Appeal [1954] 2 Lloyd's Rep. 507 reversed.

APPEAL from the Court of Appeal (Denning and Parker L.JJ., Morris L.J. dissenting).

This was an appeal by leave of the Court of Appeal from a judgment of that court dated November 9, 1954, allowing the appeal of the respondent company, West Hartlepool Steam Navigation Co. Ltd., from a judgment of Streatfeild J. dated July 26, 1954, awarding the appellant, Robert Thomas Morris, £10,960 as damages for personal injuries alleged to have been caused by the negligence of the respondent company, with costs.

The facts are set out in their Lordships' opinions.

Sir Frank Soskice Q.C. and *Michael Lee* for the appellant. The respondents did not provide the appellant with a safe place in which to work. It is not established that in their failure to erect guard-rails they followed a general practice. Even if it was a general practice it was wrong and should not be followed. A shipowner does not necessarily fulfil his duty to take reasonable care for the safety of his crew by complying with a universal practice, since it may nevertheless be shown that he negligently omitted some precaution for their safety. In *Paris* v. *Stepney Borough Council*,[1] where Lord Normand speaks of a precaution which was "so obvious" that it would be "folly" in anyone to omit it, he meant by that word imprudence and no more. His words are not so strong as those of Lord Dunedin in *Morton* v. *William Dixon Ltd.*[2] in the Court of Session which he quoted, "so obviously wanted." See also *per* Lord Oaksey[3] and Lord MacDermott.[4] As to precautions against danger, see *Clifford* v.

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[1] [1951] A.C. 367, 382; [1951] 1 T.L.R. 25; [1951] 1 All E.R. 42.

[2] 1909 S.C. 807, 809.

[3] [1951] A.C. 368, 384.

[4] Ibid. 388.

Charles H. Challen & Son Ltd.[5] and *General Cleaning Contractors Ltd.* v. *Christmas.*[6] To establish that an employer's precautions do not fall short of those of other employers as shown in their general practice is not a complete answer to a charge of negligence: *Barkway* v. *South Wales Transport Co. Ltd.*[7] An appellate tribunal should be reluctant to disturb the finding of fact of the judge of first instance: *Benmax* v. *Austin Motor Co. Ltd.*[8]; *Montgomerie & Co. Ltd.* v. *Wallace-James*[9]; *Watt* (*or Thomas*) v. *Thomas*[10]; *Powell* v. *Streatham Manor Nursing Home.*[11]

R. H. Forrest Q.C. and *M. B. Summerskill* (*J. F. Donaldson* with them) for the respondent company. The respondents were not negligent but, on the contrary, complied with the universal seafaring practice in similar circumstances. They took reasonable care for the safety of the members of the crew and it is not shown that they negligently omitted any necessary precaution. There was no evidence of such a degree of risk attaching to their conduct as would justify a finding of negligence against them. Greater risk would have attached to the operation of putting up guard-rails. The law applicable to alleged omissions by an employer to protect his servant was properly stated by Lord Dunedin in *Morton* v. *William Dixon Ltd.*,[12] where he spoke of "a thing which was so obviously wanted that it would be folly "in anyone to neglect to provide it." This was approved by Lord Normand in the House of Lords in *Paris* v. *Stepney Borough Council*,[13] where he too used the word "folly." The word should be literally construed and not derogated from. The same formula was applied in *Gallagher* v. *Balfour Beatty & Co. Ltd.*[14] As to the precautions to be taken by employers against dangers, see *London Graving Dock Co. Ltd.* v. *Horton.*[15] A plaintiff who seeks to impugn a system which has been in general use for a long time lies under a heavy onus: *General Cleaning Contractors Ltd.* v. *Christmas.*[16] People are entitled to act on what is generally considered safe: see *Bolton* v. *Stone.*[17] One should not impute negligence by reason of ex post facto happenings:

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[5] [1951] 1 K.B. 495; [1951] 1 T.L.R. 234; [1951] 1 All E.R. 72.

[6] [1953] A.C. 180, 189–190, 193–194; [1952] 2 All E.R. 1110.

[7] (1950) 66 T.L.R. (Pt. 1) 597, 606; [1950] 1 All E.R. 392.

[8] [1955] A.C. 370; [1955] 1 All E.R. 326.

[9] [1904] A.C. 73.

[10] [1947] A.C. 484; 63 T.L.R. 314; [1947] 1 All E.R. 582.

[11] [1935] A.C. 243; 51 T.L.R. 289.

[12] 1909 S.C. 807, 809.

[13] [1951] A.C. 367, 382.

[14] 1951 S.C. 712, 714, 716, 718.

[15] [1951] A.C. 737, 752; [1951] 1 T.L.R. 949; [1951] 2 All E.R. 1.

[16] [1953] A.C. 180, 192.

[17] [1951] A.C. 850; [1951] 1 T.L.R. 977; [1951] 1 All E.R. 1078.

Glasgow Corporation v. *Muir.*[18] The respondents were not guilty of folly in not erecting the guard-rails.

Sir Frank Soskice Q.C. replied.

Their Lordships took time for consideration.

Jan. 31, 1956. LORD MORTON OF HENRYTON. My Lords, about 9 a.m. on October 13, 1951, the appellant, Robert Thomas Morris, a seaman aged 18 years, fell down hatch No. 2 on the 'tween deck of a vessel called the *Daltonhall* belonging to the respondents. He fell some 30 or 40 feet into the hold and sustained serious injuries. At the time when the accident occurred the appellant was classified as an " efficient deck hand " and he had been at sea about six months. His experience had been mostly on " home trade " passenger ships, but he had been to sea in a deep sea ship four or five times, including a voyage to the Persian Gulf.

The following summary of the relevant facts is taken, in substance, from the judgment of Parker L.J.[1]: " When the " [appellant] met with his accident, the vessel was on her way, " light, from Avonmouth to Montreal to load grain in bulk." (She had left Avonmouth on October 3, and was due in Montreal in three days.) " She had carried grain on her previous voyage " and in accordance with the normal practice in grain-carrying " ships her holds were being made ready on the voyage, so that " she could load on arrival at Montreal. This involved cleaning " out the holds one by one, repairing the feeders and shifting " boards, making them fast in position and generally making the " holds grain tight. In the process of making each hold ready, " men had to work close to the 'tween deck hatch, which had a " coaming of only 10 inches in height so as not to interfere with " the operation of swinging loads between the decks. At times " they would have to sit on the hatch beams in order to fix " the shifting boards in position. With a 40 ft. drop from the " 'tween deck to the bottom of the hold, the preparation of the " hold was necessarily somewhat a dangerous operation albeit " one which sailors take in their stride despite the movement " of the vessel. As each hold was made ready the upper deck " hatch was battened down while the 'tween deck hatch covers " were left off ready for loading. This vessel, like other vessels, " carried stanchions which could be fitted round each hatch, and

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[18] [1943] A.C. 448, 455; 59 T.L.R. 266; [1943] 2 All E.R. 44.

[1] [1954] 2 Lloyd's Rep. 507, 517.

"a wire rope which could be fixed round the stanchions to form "a guard-rail. It was necessary to have these stanchions and "this wire in order to comply with the Docks Regulations while "in port, but this guard-rail could not be up while a hold was "being made ready, and was not in fact erected round the hold "after it had been made ready while at sea. Any timber not "required for repairs in a hold was stacked on the 'tween deck "beside the side of the ship, occupying 4 to 5 ft. of the 17 ft. 3 in. "space between the coaming round the hatch and the side.

"By October 13, 1951, holds Nos. 1, 2 and 3 had been made "ready, and work was in progress on No. 4 hold. The [appellant] was one of those who had worked on all the holds. On "that day the [appellant] and two others, on the instructions "of the boatswain, went to fetch a piece of timber from the pile "of timber on the 'tween deck near No. 1 hold. Owing to there "being a bulkhead aft of No. 2 hold, it was necessary to open "part of the upper deck hatch covers and to descend to the "'tween deck by means of a rope ladder. On the instructions "of the boatswain, these men opened about two sections on the "port side and descended. Not finding the desired piece of "timber in the pile by No. 1 hatch, they inspected two further "piles at and aft of No. 2 hatch. Still not having found the "desired piece, they were returning to the first pile in single file, "with the [appellant] last, when there was a scream and the "[appellant] fell down No. 2 hatch.

"Exactly how the accident happened will never be known. "The [appellant], who suffered grievous injuries, remembers "nothing, and the two men with him saw nothing of his fall. "It was alleged that the light was insufficient, but the evidence "did not bear this out, and the learned judge did not so find. "It may be that the [appellant] lost his balance owing to the "movement of the ship, and this was the view taken by the "learned judge, though it is only right to say that there was no "evidence of any unusual or sudden movement. As Mr. Burke, "one of the men with the [appellant], said: 'I do not know "'how the sea was striking us; I do not remember. A bit of "'sea was running, and a breeze, because she threw a small "'amount of spray up. I do not recollect: I do not remember "'that.'" The appellant was asked: "How was the ship "moving?" and replied: "She had a beam swell." He was then asked: "Was there any spray coming over the main deck "forward?" and replied: "I do not remember that."

H. L. (E.)

1956

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Lord Morton of Henryton.

The writ in the present action was not issued till January 15, 1954. Streatfeild J. found that the respondents were negligent in failing to put a guard-rail round the open hatch, and awarded the appellant £10,960 damages, which included £960 agreed special damage. His judgment was set aside by the Court of Appeal (Denning and Parker L.JJ., Morris L.J. dissenting).

My Lords, the nature of the evidence required to establish, as against an employer, that he has been guilty of negligence in failing to provide a safeguard for his workmen has recently been considered by this House in *Paris* v. *Stepney Borough Council.*[2] Lord Normand, in a passage which has often been cited since, said[3]: "The kind of evidence necessary to establish neglect of a "proper precaution was considered in *Morton* v. *William Dixon* "*Ltd.*[4] by Lord President Dunedin. That was an action by a "miner against his employers alleging negligence in failing to "take precautions against the fall of coal from the top of the "shaft into the space between the side of the shaft and the "edge of the cage. It was, of course, a Scotch case, but in "my opinion there is no difference between the law of Scotland "and the law of England on this point. The Lord President "said[5]: 'Where the negligence of the employer consists of "'what I may call a fault of omission, I think it is absolutely "'necessary that the proof of that fault of omission should be "'one of two kinds, either to show that the thing which he did "'not do was a thing which was commonly done by other "'persons in like circumstances, or to show that it was a thing "'which was so obviously wanted that it would be folly in "'anyone to neglect to provide it.' The rule is stated with "all the Lord President's trenchant lucidity. It contains an "emphatic warning against a facile finding that a precaution is "necessary when there is no proof that it is one taken by other "persons in like circumstances. But it does not detract from "the test of the conduct and judgment of the reasonable and "prudent man. If there is proof that a precaution is usually "observed by other persons, a reasonable and prudent man will "follow the usual practice in the like circumstances. Failing "such proof the test is whether the precaution is one which the "reasonable and prudent man would think so obvious that it was "folly to omit it." In the same year, in the case of *Gallagher* v. *Balfour Beatty & Co. Ltd.*,[6] the Lord President (Lord

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[2] [1951] A.C. 367; [1951] 1 T.L.R. 25; [1951] 1 All E.R. 42.

[3] [1951] A.C. 367, 382.

[4] 1909 S.C. 807.

[5] Ibid. 809.

[6] 1951 S.C. 712, 716.

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Cooper) referred to Lord Normand's speech, just quoted, and observed: "The law . . . as epitomized in the Dunedin formula, "has been adopted in every textbook, and, as was observed in "*Carroll* v. *Andrew Barclay & Sons Ltd.*,[7] it has been used as a "proper direction to juries 'in scores of cases,' and also, may I "add, as a test of the relevancy of scores of cases of defective "system." The Lord President protested[8] against discarding "in favour of a milder version the formula which we have used "consistently for more than forty years, and which is sanctioned "by the highest authority." Later[9] he referred to Lord Normand's speech in the *Paris* case[10] as "the latest pronouncement "on the subject," which "reverts to the forcible language of the "original formula."

My Lords, I refer to *Gallagher's* case[11] because I deprecate a tendency, manifested in the present and other cases, to substitute some other word for the word "folly" in Lord Dunedin's formula. Either the substituted word has the same meaning, in which case the substitution serves no useful purpose, or it has a different meaning, in which case the substitution is unjustified. The word "folly" was repeated by Lord Normand and myself in *Paris's* case[12] and there was no difference of opinion in the House as to the test to be applied, although there was a difference of opinion as to the result of applying it. In the present case attention was called, in the course of the argument, to the fact that in *Paris's* case[13] Lord Normand used the words "so "obvious," whereas Lord Dunedin in *Morton's* case[14] had used the words "so obviously wanted." I think it is clear that Lord Normand did not intend to introduce any qualification into Lord Dunedin's language. He merely desired to point out that in considering whether a precaution was "so obviously wanted that "it would be folly in anyone to neglect to provide it," the court must look at the matter from the standpoint of the reasonable and prudent man. I mention this matter because I can imagine contexts in which the word "obvious" might have a different meaning from "obviously wanted," but the word clearly bore the meaning "obviously wanted" in the context in which Lord Normand used it.

My Lords, I now return to the facts of the present case. It is manifest that the evidence, far from establishing that the erection of a guard-rail while the vessel was at sea was " a thing " which was commonly done by other persons in like circum- " stances " was all to the effect that for various periods up to 40 years it had never been done by persons in like circumstances. Your Lordships must therefore consider whether the appellant proved—for the onus was on him to prove negligence—that a reasonable and prudent owner or master of the *Daltonhall* would have thought, before the accident happened, that a guard-rail was " a thing which was so obviously wanted that it would be " folly in anyone to neglect to provide it."

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[7] 1947 S.C. 411, 418.
[8] 1951 S.C. 712, 717.
[9] Ibid. 718.
[10] [1951] A.C. 367.
[11] 1951 S.C. 712.
[12] [1951] A.C. 367, 382, 387.
[13] Ibid. 382.
[14] 1909 S.C. 807, 809.

My Lords, in my view the evidence falls very far short of proving this. In so saying I am differing from the view of the learned trial judge who heard the evidence, but in the present case there was no conflict between the witnesses, except possibly on the question whether men were " often " sent to fetch timber from the 'tween deck. On that question I accept the finding of Streatfeild J. that this was " quite usual." The case is therefore one in which the question is simply whether the facts proved do or do not give rise to the inference that the respondents were negligent. That question, as Lord Halsbury said in *Montgomerie & Co. Ltd.* v. *Wallace-James*,[15] " the original tribunal is in no " better position to decide than the judges of an appellate court." See also the observations of Viscount Simonds in *Benmax* v. *Austin Motor Co. Ltd.*[16]

To my mind, the appellant's allegation of negligence was disproved, to a large extent, by the only witness he called, the seaman Burke, who was with him when the accident occurred. Burke was an " able-bodied seaman " who had been four years at sea. I quote the following portion of his evidence:—

Mr. Lee: " Mr. Burke, while you were working down on the " 'tween deck in No. 2 hold, and indeed No. 1 hold, had those " hatches on the 'tween deck ever been guarded by hatch-boards " or guard-rails while the ship was at sea? " (A.) " No, Sir, " they had never been covered; while we were working on that " particular job they had never been covered."

Streatfeild J.: " Covered with what? " (A.) Hatch-boards, " and there were no guard-rails."

Mr. Lee: " Mr. Burke, what was the practice in your four " years at sea; what is the practice with merchant shipping at " sea when there is work to be done getting the holds ready for a " cargo? " (A.) " In that case, when you are cleaning the hold

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[15] [1904] A.C. 73, 75.

[16] [1955] A.C. 370, 373; [1955] 1 All E.R. 326.

"ready for grain, it is general to leave the hatches open in the "'tween deck; that is the usual thing; and as regards the safety "rails, for my part I have never seen safety rails erected in a "case like that. We had already swept and cleaned the 'tween "deck."

(Q.) "Once the work is finished, what happens then?" (A.) "When the work is finished you have no more reason to "enter the holds, if the work is finished, and the hatches are "still left uncovered."

Streatfeild J.: "But then if you had happened to go and do "some more work there, is there any reason why there should "not be any guard-rails?" (A.) "No reason, my Lord, no; but "there were no guard-rails, and I have never seen them used."

Later he said: "I have never heard of anyone asking or "demanding that guard-rails should be put round while at sea. "You would probably be laughed at, sir." I couple with that evidence the evidence of Mr. Clark, the chief officer (40 years at sea): "I have never seen guard-rails erected in my life"; of Mr. Barker, the boatswain (16 years at sea): "we never put "guard-rails up at sea"; and of Captain Lovegrove (35 years at sea): "In actual practice they are not put up at sea."

My Lords, in the face of this evidence, I would find it difficult to hold that a guard-rail round the hatch was a thing which was "so obviously wanted" that the owners and master of the *Daltonhall*, and inferentially the owners and masters of all the ships of a similar type on which these four experienced witnesses had sailed, were guilty of folly in failing to ensure that such a rail was erected. I agree with the observation of Denning L.J.[17] that "general practice weighs heavily in the scale, but it is not "conclusive," but, weighing all the circumstances of this case, I agree with Denning and Parker L.JJ. that the respondents are not proved to have been negligent. It must be borne in mind that once the work of cleaning and repairing hatches 1 and 2 had been finished, the portion of the 'tween deck which contained them was a completely enclosed space. The upper deck hatches were battened down and the bulkhead aft of No. 2 hatch cut off this portion of the 'tween deck. No one except members of the crew could go into this space while the ship was at sea, and there would appear to be no reason for any member of the crew to go there unless he was ordered, as the appellant was, to fetch timber from one of the three piles already mentioned.

[17] [1954] 2 Lloyd's Rep. 507, 510.

I shall not detain your Lordships by travelling all through the evidence. No witness had heard of any similar accident occurring. The appellant was an active young man of 18 years who was training to be a heavy-weight boxer and had been at sea for six months, as he said, " more or less for the toughening-up " process for boxing." The learned judge rejected the suggestion that the light was not good enough to enable him to see where he was going. He knew his way about and knew the exact position of the hatches as he had been working in the preparation of them. There is no evidence that the weather conditions were in any way exceptional. All that he had to do was to follow two other men past the hatch on a portion of the deck which was 12 feet wide at its narrowest point. Yet he fell through the open hatch. To my mind this was an extraordinary event which could not have been anticipated. I agree with Denning L.J.[17] that the words of Lord Thankerton in *Glasgow Corporation* v. *Muir* [18] are particularly appropriate: " The court must be careful to place " itself in the position of the person charged with the duty . . . " and not to give undue weight to the fact that a distressing " accident has happened."

Further, as Parker L.J. said,[19] the reasonable and prudent " employer is entitled to take into consideration the degree of " risk, if any, involved in taking precautionary measures . . . " If there was any real degree of risk in walking along the 12 ft. " gangway, then the risk of accident to a man putting up the " guard-rail by the edge of the coaming would be if anything " greater. Captain Lovegrove said: 'I think it' " (i.e., the erection of a guard-rail) " 'might be a degree more dangerous " 'than doing a job a few feet away from the hatch . . . on the " 'basis of movement of the ship.' The guard-rail would be only " a matter of a few inches from the coaming. And again: 'If I " 'had a personal choice myself between sending the seamen to " 'get a piece of timber from the wing of the deck, and giving him " 'the job of putting up the guard-rail, and the ship was rolling, " 'I would choose the former.' It is true that other witnesses " said that the guard-rail could have been put up without danger " in a very few minutes, but it is clear that they all took the " view that there was equally no danger in walking along the " gangway."

I think that Streatfeild J. based his decision in favour of the appellant largely upon two answers by Captain Lovegrove. He was asked whether, as a matter of precaution, guard-rails should have been erected and he answered: "In practice it is not done; "I do not say that they should not be erected, but in practice "it is not done." At the end of his evidence come the following questions and answers:—

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[17] [1954] 2 Lloyd's Rep. 507, 510.

[18] [1943] A.C. 448, 454–455; 59 T.L.R. 266; [1943] 2 All E.R. 44.

[19] [1954] 2 Lloyd's Rep. 507, 518.

(Q.) "Well, now you know it has been brought home to us "all what happens to a young man, a strong and fit young man, "who is cast 40 feet down to another deck?" (A.) "Yes, but "apart from that, the accident, I would go on for quite a considerable time not having guard-rails put up because it is not "the usual practice to put them up at sea."

(Q.) "But is it not time the practice was altered?" (A.) "I "agree."

My Lords, I agree with the majority of the Court of Appeal in thinking that these answers are too slender a basis for finding negligence against the respondents. Captain Lovegrove was, I think, being wise after the event, being moved, no doubt by regret, that so sad an accident had happened. These two answers must be read together with the rest of his evidence, and he had already said, in agreement with all the other witnesses, that guard-rails never were put up and had added that "it would not "occur to anybody to put them up."

In my opinion, the respondents are not proved to have been guilty of any negligence, and I would dismiss the appeal.

LORD PORTER. My Lords, the relevant facts in this matter are contained in a very small compass. For my purpose it is enough to say that the plaintiff (the appellant) was one of three men sent down to the 'tween deck above Nos. 1 and 2 deep holds of the s.s. *Daltonhall* when on a voyage from Avonmouth to Montreal unladen, but with the purpose of loading grain at the latter port. Their object and instructions were to find spare boards suitable for use in No. 4 hold which was being cleaned for the reception of cargo at Montreal. That hold was separated from Nos. 1 and 2 by the central structure of the ship and in order to reach the latter some of the hatch coverings of the upper deck above No. 1 lower hold had to be removed. From this opening a certain amount of light was provided for the 'tween deck. One of the plaintiff's allegations in his pleading was that not enough light was given through the aperture thus provided to enable anyone engaged on a task in the 'tween decks to see his surroundings adequately. I refrain from discussing this point because there was little evidence that it had any effect upon the case and the learned judge who tried it thought a lack of light had no bearing upon the conclusion which he reached in favour of the plaintiff. Reliance was, however, placed upon the facts that the first two deep holds were open to the 'tween decks, were unprotected by any guard-rails fencing the open hatches and that the ship was rolling to an appreciable degree in a beam sea.

The boards on the 'tween decks in question were stacked in three positions—(1) against the skin of the ship opposite the after end of No. 1 deep hold; (2) in a pile, again next to the skin of the ship opposite No. 2 hatchway; and (3) aft of No. 2 hatchway, and against a temporary bulkhead and some 12 feet inwards from the ship's port side. I ought to add that in each of the two former cases the pile of timber extended some 4 to 5 feet from the ship's side. In the direct line between the third pile and the second was a trimming hatch 11 feet behind No. 2 hatchway and 8 feet 8 inches from the ship's port side, so that anyone passing from the third to the second pile would have to go either to port or starboard of it.

The appellant was 18 years old at the relevant time, had been about six months at sea and four or five times in deep sea ships. He and Burke, an older and more experienced man, together with McCambridge, a boy of 17, were, on the day in question, the three persons sent to search for suitable timber in the 'tween deck; and it is clear that it was proper in performing this task that they should visit and search each of the three piles which have been mentioned. They did search all three piles, starting from that opposite No. 1 hold, proceeding thence to No. 2 and then to No. 3. In none of them did they find the type of material required, and by way of ensuring that they had not overlooked what they wanted they purposed to return to piles 2 and 1 in order to look again. All three men started to walk back from No. 3 to No. 2 pile, Burke and McCambridge leading and the appellant following. On their way a scream was heard and the appellant was found to have fallen into the deep hold No. 2 and to be very seriously injured.

The sole question for the consideration of your Lordships is whether the respondents were negligent in not fencing the hatchway into this hold.

There was at one time some suggestion that the hatches should have been replaced, but no great stress was laid upon this allegation as, admittedly, fencing round the hatch would have been an adequate safeguard, and the necessary stanchions and wire ropes were available and could easily have been erected in anything from 15 minutes to half an hour. Under Board of Trade Regulations it is obligatory to erect the fencing round open holds whilst the ship is in port unless work is actually being done at the hold in question. At sea there is no such requirement, and, indeed, the respondents claimed to have established in evidence a practice never to do so in a grain-carrying ship, as this one was, whilst at sea. The appellant, however, asserted that the practice had not been proved to be universal in all such ships and pointed out that in cross-examination Captain Lovegrove, the expert witness called on behalf of the respondents, acknowledged that he did not know the conditions in the *Daltonhall* or what the weather was like, or what work had been done or when, and that he was just talking about general practice in saying that guard-rails were not put up at sea. Counsel for the appellant, not unnaturally, and perhaps wisely, did not pursue that matter with the witness any further. The witness was not, however, asked in what way this ship differed from other grain-carrying ships, and the weather and the work which had been done were established aliunde.

Apart from these matters Captain Lovegrove's evidence was that at sea the guard-rails were never erected; he "did not say "they should not be erected, but in practice it is not done." In cross-examination he was asked: "It is just really that it is not "done because seamen generally are expected to look after them-"selves," and replied: "They are not expected to look out for "themselves; it is their natural bent, and, being seamen, to be "able to handle themselves in all parts of ships in all weathers." The plaintiff had complained that he was apt to be seasick and therefore had not got his sea legs though the ship had been some 10 or 12 days at sea, and the witness was asked: "You have "seen, have you not, men who have not found their sea legs "or inexperienced deck hands staggering about the deck with a "sudden roll?" and replied: "Well, I must say that I have "noticed that the average young man today will gain his sea legs "very quickly; if for no other reason than to prove to his more "senior mates that he had got hold of the job." "Some," he added, "might find it more difficult, but not for very long after "leaving port; not in the case of the young men." It is only fair to add that he agreed that after the accident it was time that the practice of not putting up the guard-rails at sea was altered.

I have set out this evidence because it is, I think, the high water mark of the plaintiff's case on the question of the danger involved, and was claimed to give some support to the contention that the practice of never railing the 'tween deck hatchways when at sea had not been generally established. The rest of the evidence on behalf of either side did not accept the existence of any danger.

Burke, a plaintiff's witness, when asked in cross-examination: "If you had been sent down to the 'tween decks to carry out "some work and you knew it was going to take a little longer "than just looking for timber, you would have asked for a guard-"rail to go up?" replied: "No, sir, I would not; it perhaps would "not have crossed my mind." As to guard-rails, his general evidence was that they were never put up at sea, though they may sometimes have been left up if erected previously in port. One can perhaps best exemplify Burke's view as to guard-rails by quoting a further portion of his evidence in cross-examination by the defendants' counsel, Mr. Hughes:

(Q.) "Mr. Burke, when you had been at sea on the other "ships, do I understand you to say that you had never seen "guard-rails on those other ships when the hatch-covers are off "the 'tween decks?" (A.) "I cannot recollect seeing any. "They did not strike me as being important enough to me, if I "had seen them, to remember them."

(Q.) "You cannot recollect?" (A.) "I cannot recollect, but "I have never heard of anyone asking or demanding that guard-"rails should be put round while at sea. You would probably "be laughed at, sir."

One more matter as to danger may conveniently be disposed of at this point. Captain Lovegrove, in his evidence, said that in his opinion the putting up of stanchions involved greater danger than passing along the 'tween deck with the hold open. Mr. Burke would have none of it. In his view it would not involve any appreciable danger, and, indeed, this was the general view of the other witnesses and was accepted by the learned judge. There was ample evidence to justify this finding, and, in my opinion, it would be wrong for your Lordships to differ from him.

None of the other witnesses appears to have been asked directly whether, in their opinion, as seamen, they would have looked upon the task set to the three men as involving any danger, though in answer to a question by Mr. Lee, on behalf of the plaintiff, Mr. Barker, the bo'sun, who sent the men down and was called on behalf of the defendants, agreed that the presence of either hatches or a guard-rail would have prevented an accident, but his general attitude was, I think, that seamen were safe without them. His attitude can be illustrated by certain questions asked and answers given in examination-in-chief to Mr. Hughes.

(Q.) "We know that there were sockets for guard-rail "stanchions but that no guard-rails were put up." (A.) "That "is correct."

(Q.) "As bo'sun, did you ever require them to be put up?" (A.) "Well, I had only joined the ship myself seven days, and "we were finding them in various places round the 'tween decks. "I did not see any complete."

(Q.) "Were they ever put up to your knowledge when you "were on the ship?" (A.) "Not that voyage."

(Q.) "Did you ask for them to be put up?" (A.) "I never "asked; we do not usually ask for them; we are usually asked "ourselves to put them up for other people. We do not ask to "put them up, as we do not need them normally ourselves."

(Q.) "Just tell me why." (A.) "Well, it is a case that we "are used to the job more than other people, and we just do not "think of it, like the dockers; but I suppose if we had been "asked for them, we would have had to put them up."

I have already dealt with Captain Lovegrove's evidence as to the practice of not putting up guard-rails round the hatches whilst at sea. The other witnesses without exception said that, although there was no difficulty in erecting them, it was in fact never done in this or any other ship so far as they knew. Mr. Clark, however, like Captain Lovegrove, accepted the view put to him in cross-examination that it might have been worth while to prevent this sort of thing happening if he and the bo'sun had put their minds to it, but here again he was speaking after the event.

One of the chief criticisms of this class of evidence was that the conditions in this ship might well be different from those in others, that the plaintiff was a young and inexperienced man, who had not got his sea legs, and that whereas some of the witnesses explained that the erection of guard-rails was unnecessary because members of the crew never, or, at any rate, seldom, entered the 'tween decks during the voyage, in fact in this ship and, indeed, in some others, men were not infrequently sent to them.

Though the plaintiff said he was constantly seasick, his fellows regarded him as a sufficiently experienced hand quite capable of looking after himself and thought that any seaman, after a few days out, would have gained his sea legs. Admittedly he had been working in the holds and knew of the open hatch, and it is not suggested that his seasickness was known to anyone. Nor was any evidence given or suggestion made as to the respects (if any) in which this ship differed from other grain-carrying ships.

As to the general practice of putting up guard-rails at sea, I can find no evidence that in this or any other grain ship they were ever erected. Moreover, there remains the fact that there are Board of Trade Regulations requiring their erection in port, whereas there are no regulations creating an obligation for their use at sea. It is possible, as was suggested, that the Board of Trade has no jurisdiction over ships outside the three-mile limit, but, if it was a plain danger, I should have expected it to be dealt with in some way.

Ultimately, the question is, would a reasonably prudent shipowner or seaman have foreseen the danger of this accident and guarded against it? Speaking for myself I should not regard the passing along a 12-foot passageway, even in a moderate sea, as a danger to a seaman, nor should I have expected any seaman to have foreseen the likelihood of such an accident, especially after 40 years in which no accident was, at any rate, known to the witnesses to have occurred, nor was evidence of any such event having occurred forthcoming. Opinions differ, no doubt, and apparently the learned judge was impressed by the risk of an open hold. The Court of Appeal, on the other hand, by a majority took the view that no appreciable danger had been established. Morris L.J., however, who agreed with the learned judge, thought that if the plaintiff's route from number 3 to number 2 pile had led him to pass the starboard side of the trimming hatch and he had then walked directly forward, he might pass within 3 feet of the open hatchway. No doubt he might, but he was proceeding not directly parallel to the sides of the ship but to the second pile, and if he did so, whether he went to port or starboard of the trimming hatch, his route to the second pile would never be less than 9 or 10 feet from the hatchway to number 2 hold.

I, myself, am a good deal influenced, and, I think, rightly, by evidence which seems to establish that the existence of any such danger would never have occurred to a seaman.

Apart from these considerations I am additionally strengthened in my view by the evidence of the practice prevailing on grain ships. To my mind, it is amply proved, and though some witnesses thought that the reason was because it was unnecessary to go to the 'tween decks between ports, yet they cast no doubt upon the existence of the practice itself. The practice is established, though the reason given for it may be mistaken. As to the difference between the obligation in port and at sea, it may well be that, with dockers working round a hold, it is desirable to take precautions which are not necessary in the case of seamen who have at least 9 or 10 feet of space between them and the open hold. At any rate, the difference in obligation in fact exists.

It was suggested that the reason why the danger was not appreciated was that no one had brought their minds to bear upon it.

In *Bolton* v. *Stone* [20] I expressed the view that defendants would be in a stronger position if the risk was so small that they never thought about it than if they had considered it and decided the risks were very small. I adhere to that view. Men do not stop to consider whether each step they take is safe. They act upon what is generally regarded as a safe course until some untoward event shows that they may have been mistaken, and then, as Lord Thankerton pointed out in *Glasgow Corporation* v. *Muir*,[21] one must be careful not to impute negligence from ex post facto events.

If the practice is fully established, as I think it is, I am content to follow the words of Lord Dunedin in *Morton* v. *William Dixon Ltd.*[22] as restated in this House by Lord Normand in *Paris* v. *Stepney Borough Council.*[23] Lord Dunedin's words are: "Where the negligence of the employer consists of what I "may call a fault of omission, I think it is absolutely necessary "that the proof of that fault of omission should be one of two "kinds, either to show that the thing which he did not do was a "thing which was commonly done by other persons in like circum-"stances, or to show that it was a thing which was so obviously "wanted that it would be folly in anyone to neglect to provide "it." Lord Normand put the same opinion in his own words in this way [23]: ". . . the test is whether the precaution is one "which the reasonable and prudent man would think so obvious "that it was folly to omit it." I quote the words, though for the purpose of this case I am content, without expressing any opinion as to its exact meaning, to construe "folly," as Parker L.J. did,[24] to mean no more than "imprudent" or "unreasonable." To my mind, having regard to the practice, the omission to fence was neither imprudent nor unreasonable, much less an act of folly. "It is true," the learned Lord Justice added,[24] "that other

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[20] [1951] A.C. 850, 859; [1951] 1 T.L.R. 977; [1951] 1 All E.R. 1078.

[21] [1943] A.C. 448, 455.

[22] 1909 S.C. 807, 809.

[23] [1951] A.C. 367, 382.

[24] [1954] 2 Lloyd's Rep. 507, 518.

"witnesses" (i.e., other than Captain Lovegrove) "said that "the guard-rail could have been put up without danger in a very "few minutes, but it is clear that they all took the view that "there was equally no danger in walking along the gangway," and with this view I agree.

Accordingly, I am of opinion that the appeal should be dismissed, both because the evidence, to my mind, establishes that to a seaman no such accident would have been looked for, especially since, in an experience lasting up to 40 years, such an accident was unknown, and because it was not the practice in grain ships to put guard-rails round the hatchways to the lower hold whilst at sea.

I should add that, if I thought the arguments equally balanced, I should think it my duty to follow the decision of the Court of Appeal.

Finally, it was urged upon us that the learned judge had the witnesses before him and was therefore in a better position than an appellate court to evaluate the evidence. Where belief in the accuracy of witnesses or their demeanour comes in issue I agree, but as I have pointed out, there is little dispute as to the facts save in two cases, in both of which I have followed the findings of the court of first instance. Otherwise it is not fact but inference from facts with which your Lordships are concerned, and in such a case an appellate court is in as good a position to determine the issue as is the judge who tried the case.

I would dismiss the appeal.

LORD REID. My Lords, a seaman may encounter a variety of grave and inescapable perils, and in comparison the risk to which the appellant was subjected in this case was very small. But it has not been argued that a shipowner is under any less duty than an occupier of premises on land to eliminate unnecessary risks so far as that is reasonable and practicable.

In the present case the appellant had to walk along a space on the 'tween deck some 12 feet wide between a pile of dunnage and an open hatchway. He knew the place and, even allowing for a permissible degree of inattention, I find some difficulty in understanding how, without foolhardiness or negligence, he could have come to be so near the hatchway as to fall into it. In the defence of this action the respondents pleaded "the defendants "will contend that the said accident was caused or contributed "to by the plaintiff's own negligence," but this defence was abandoned at an earlier stage of the case. As there is now no plea of contributory negligence, the case must be dealt with on the footing that it cannot be inferred from the evidence that the accident could not have happened without the appellant being guilty of negligence. The case could not be decided in favour of the respondents on a ground which they do not now plead. If we must take it that the accident may have happened without the appellant being negligent, it necessarily follows that there was some risk to a seaman who was not negligent if he was required to walk past this open hatchway, and the only question is whether that was a risk which the respondents ought to have foreseen and eliminated. The appellant's case is that a guard-rail should have been erected, and that this could have been done with very little trouble, and would have prevented the accident.

In some cases it may be open to an employer to say that, although the accident shows that there was in fact a risk to a man who was not negligent, the kind of risk was such that it could not reasonably have been foreseen before the accident. But I do not think that that can be said in this case. An open hatchway is an obvious danger and, if a man can without negligence come sufficiently near it to fall into it, I do not see how it can be said that this is not reasonably foreseeable or that there is no risk at all of his doing so. For a young and active seaman it may be that the risk is small even when the ship is rolling, but there are so many ways in which a man may slip or lose his balance without that being solely due to his negligence that I do not think that a prudent employer would be entitled to assume that there was no risk at all of an accident even in rough weather.

The respondents rely on a statement of the law by Lord Dunedin in *Morton* v. *William Dixon Ltd.*,[25] which has often been approved. I need only refer to the speech of Lord Normand in *Paris* v. *Stepney Borough Council*,[26] and the opinion of Lord President Cooper in *Gallagher* v. *Balfour Beattie & Co. Ltd.*[27] Morton, a bottomer in a pit, was injured by a piece of coal which fell down the shaft, and it was alleged that there ought to have been some sort of shielding contrivance to prevent this. There was no evidence that this was a common expedient and it was at least doubtful whether it was practicable in this particular shaft. Lord Dunedin said[28]: "Where the negligence of the "employer consists of what I may call a fault of omission, I "think it is absolutely necessary that the proof of that fault of

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[25] 1909 S.C. 807, 809.

[26] [1951] A.C. 367, 382.

[27] 1951 S.C. 712.

[28] 1909 S.C. 807, 809.

"omission should be one of two kinds, either—to show that the "thing which he did not do was a thing which was commonly "done by other persons in like circumstances, or—to show that "it was a thing which was so obviously wanted that it would "be folly in anyone to neglect to provide it." Lord Normand having quoted this passage said [29]: "The rule is stated with "all the Lord President's trenchant lucidity. It contains an "emphatic warning against a facile finding that a precaution is "necessary when there is no proof that it is one taken by other "persons in like circumstances. But it does not detract from "the test of the conduct and judgment of the reasonable and "prudent man. If there is proof that a precaution is usually "observed by other persons, a reasonable and prudent man will "follow the usual practice in like circumstances. Failing such "proof the test is whether the precaution is one which the "reasonable and prudent man would think so obvious that it "was folly to omit it." In *Gallagher's* case [30] Lord Cooper, after expressing some apprehension that Lord Dunedin's test had been weakened by certain decisions, said that the passage which I have quoted from Lord Normand's speech "reverts to the forcible "language of the original formula, and in my view replaces it on "the pedestal from which it seemed to be dislodged."

Lord Dunedin's statement of the law must now be read with Lord Normand's gloss and it is important to see what it was that this House held to be "folly" in *Paris's* case.[31] A one-eyed garage hand, trying to remove from a vehicle a bolt which had rusted in, struck it with a hammer, and a metal chip flew off and injured his eye. He alleged fault in respect that his employer failed to provide him with and require him to wear suitable goggles. It was proved that it was not the practice to wear goggles at such work. It was not decided whether the employers were entitled to rely on this practice in the case of men with no disability, but it was in effect held that by reason of the more serious consequences to a one-eyed man if an accident causes him to lose the sight of an eye, goggles were for him "a thing so "obviously wanted that it would be folly in anyone to neglect to "provide it," or a precaution which "the reasonable and prudent "man would think so obvious that it was folly to omit it."

I must now turn to the evidence in this case. This ship was one which carried grain in bulk and made the outward voyage in ballast. No. 2 'tween deck hatch, where the accident occurred, was partly open and partly occupied by a large wooden feeder which remained in position. Earlier in the outward voyage the hold had been cleaned out and the feeder and other woodwork repaired. There is evidence that a guard-rail could not have been put up while this work was going on because it would have impeded the work, and if there was negligence it was in failing to put up a guard-rail when the work was finished and before the men left that part of the 'tween deck. The only access to that part of the 'tween deck was by ladder from the upper deck where the hatches were battened down, and, if there was no likelihood of men being sent down to the 'tween deck during the remainder of the voyage, there was no point in guarding the open hatch and no obligation to do so. But the evidence in this case is that in this ship men were not infrequently sent down to the 'tween deck as the appellant was. He and two other men were sent down to look in the piles of dunnage for timber required for other work. So, when the cleaning and repair work at this hatch was finished, it ought to have been foreseen that men might well have to return to that part of the deck at some time during the remainder of the voyage, and the question is whether in that state of affairs it was negligent to leave unprotected that part of the open hatchway not occupied by the feeder.

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[29] [1951] A.C. 367, 382.

[30] 1951 S.C. 712, 718.

[31] [1951] A.C. 367.

There is evidence that the general practice was not to put guard-rails round open hatches on the 'tween decks, but the evidence of some of the witnesses is that the reason for that practice was that no one was likely to go near the open hatches. Burke, an able seaman, said: " You have no more reason to enter " the holds if the work is finished, and the hatches are still left " uncovered." Clark, the chief officer, said that there was no reason why guard-rails should not be put up, and, when asked why it was not the practice to put them up, he said: " There is " really no necessity for them, because when the work is finished " in one hold there is no need for anybody to go down there "; and again: " Nobody goes down to the 'tween decks when there " is no work going on." He thought, wrongly, that the appellant ought not to have been in that part of the ship when the accident occurred.

Barker, the bo'sun, when asked why guard-rails were not put up, said: " The truth is that if the stanchions were there we " would have had a lot of trouble with the feeder: with that and " various other things." There is nothing to support this reason; the agreed plans do not support it and counsel were unable to explain how any such trouble could arise. This was, however, a good reason for not putting up guard-rails while cleaning operations were proceeding, and perhaps that is what the bo'sun had in mind.

The most important witness was Captain Lovegrove, who had many years' general experience. He said that in dock, when the regulations apply, guard-rails are put up at the beginning of the day by the ship's crew: I do not think that he meant that this was done every day, but that it was done if the circumstances were such as to bring the regulations into operation. Then he explained that guard-rails are not put up at sea while cleaning and repairing is going on because they would impede the work, and when asked about putting up the guard-rails when that work is finished he said: "In practice it is not done; I do not say that "they should not be erected, but in practice it is not done." And when asked whether it would not be easy to put them up he said: "It would, yes, but it would not occur to anybody to "put them up." He said he had not personally known of an accident like this before; and then: (Q.) "If it had happened to "you would you have seen to it in future that guard-rails were "put up?" (A.) "I would, yes." (Q.) "Because you would "then realize the magnitude of the risk?" (A.) "Quite." Finally he said: "Apart from the accident I would go on for "quite a considerable time not having guard-rails put up because "it is not the usual practice to put them up at sea." (Q.) "But "is it not time the practice was altered?" (A.) "I agree."

I cannot find in Captain Lovegrove's evidence any indication whether or to what extent he thought that it was a general practice for men to go down to the 'tween deck during the voyage after the cleaning up is finished, but, in giving his opinion that the practice of leaving 'tween deck hatches open was a bad practice, I think he must have had in mind that the men are at least occasionally sent near these open hatches. Before leaving Captain Lovegrove's evidence, I must note an answer which he gave about the danger of putting up guard-rails: he said: "If "I had a personal choice myself between sending the seaman "to get a piece of timber from the wing of the deck, and giving "him the job of putting up the guard-rail, and the ship was "rolling, I would choose the former." I think that he must have had in mind sending someone down specially to put up the rails. I can hardly think that he meant that there would have been any additional danger if the men who were cleaning and repairing at the open hatch stopped to put up rails before they left. If it had been right to leave the hatch open at that time because no one was likely to come near it again, and if later there had been some unexpected necessity for some men to go down there, then it would have been quite unreasonable to send someone down first to put up the rails. But, as I have said, the evidence shows that it ought to have been foreseen at the time of the cleaning operation that men might be sent down later in the voyage.

It was argued that, whether the practice of leaving the hatches unprotected was good or bad, the respondents were entitled to rely on it because it had gone on a long time and no one had heard of an accident arising from it. I would agree that, if a practice has been generally followed for a long time in similar circumstances and there has been no mishap, a reasonable and prudent man might well be influenced by that, and it might be difficult to say that the practice was so obviously wrong that to rely on it was folly. But an employer seeking to rely on a practice which is admittedly a bad one must at least prove that it has been followed without mishap sufficiently widely in circumstances similar to those in his own case in all material respects. This part of this case has caused me considerable difficulty, but I do not think that it has been proved that the circumstances were similar where the practice prevailed. There was no evidence that it was the practice in other ships for men to be sent to the 'tween decks after cleaning and repairing was finished and two witnesses thought it was not; on the other hand, there is evidence, accepted by the trial judge, that that was "quite usual" in this ship. And if in other ships this happened very seldom, then it is not surprising that no one had heard of an accident. If it ought to have been foreseen in this case, as I hold it ought, that men might be sent near this hatchway during the remainder of the voyage, I do not think that the respondents can rely on this practice as having absolved them from the duty to consider whether guard-rails ought to be put up.

Apart from cases where he may be able to rely on an existing practice, it is the duty of an employer, in considering whether some precaution should be taken against a foreseeable risk, to weigh, on the one hand, the magnitude of the risk, the likelihood of an accident happening and the possible seriousness of the consequences if an accident does happen, and, on the other hand, the difficulty and expense and any other disadvantage of taking the precaution.

Here the likelihood of an accident may have been small, but at least it was sufficient to prevent the respondents from maintaining that the accident could not have happened without the appellant being negligent. And the consequences of any accident were almost certain to be serious. On the other hand, there was very little difficulty, no expense and no other disadvantage in taking an effective precaution. Once it is established that danger was foreseeable and, therefore, that the matter should have been considered before the accident, it appears to me that a reasonable man weighing these matters would have said that the precaution clearly ought to be taken. I am therefore of opinion that the appeal should be allowed.

LORD TUCKER. My Lords, this appeal turns almost entirely upon the evaluation to be placed upon the facts found by the trial judge which have been already referred to and as to which there has been very little dispute at any stage of the proceedings.

The open 'tween deck hatch with a drop of 40 feet was an obvious danger; the consequences of anyone falling to the bottom of the hold might well prove fatal and would almost inevitably be serious. The degree of danger would vary with the kind of weather encountered and with the skill and experience of the crew who were required from time to time to go to the 'tween deck to fetch pieces of timber which were stacked by the side of the ship, occupying some 4 or 5 feet of the 17 feet 3 inches space between the 9-inch coaming round the hatch and the ship's side, an operation which was performed in a subdued light.

The precise cause of the appellant's accident is unknown. The weather was not rough, but there was evidence that a "bit "of sea was running, and a breeze, because she threw a small "amount of spray up" and "she had a beam swell." The inference drawn by the trial judge and Morris L.J. that some movement of the ship was probably a contributing cause was, I think, fully justified.

What, then, was the explanation or justification for leaving this 'tween deck in that condition? It seems to have been accepted that in this particular type of ship it was not practicable to put the hatch covers on when the work of cleaning and repairing each hold was completed because a "feeder" used for loading grain was placed across the hatch. This being the position, it was apparently not considered necessary to take the precaution of putting up the stanchions, which were available and carried on board in case they should be required in certain circumstances which may arise in the course of loading or unloading when in port, and using them with a rope to form a guard. The evidence clearly established that this could easily have been done in a very short time. I will return later to the possible danger involved in this operation.

The defence was that, in doing as he did, the master was merely following the invariable practice adopted at sea within the experience of witnesses, which covered a period of some 40 years, during which time no accident of this nature had occurred.

The value of this evidence as to the general practice is, I think, greatly diminished when it is closely examined. In the first place, in so far as it relates to all vessels without distinction, it is of no assistance because the use of guard-rails does not arise unless there are special reasons—as in the present case—why the hatch covers cannot be replaced, or where the circumstances do not require the crew to visit the 'tween deck in the ordinary course of their duties. So that it is only the practice of grain ships travelling in ballast that is relevant. The practice relied upon cannot, in my opinion, be justified. It was a practice which prevailed in all circumstances irrespective of weather conditions or the age and experience of the crew. It is said that in rough weather the upper deck hatches would not have been taken off and so access to the 'tween deck would not have been available, and that the bo'sun would use his discretion with regard to sending men to fetch these timbers in bad weather, even if it was possible to remove the upper deck hatch covers.

My Lords, I cannot think that such a practice as this comes up to the standard required from a reasonably prudent employer whose duty it is to take reasonable steps to avoid exposing his servants to unnecessary risks. Sailors are, of course, necessarily exposed to many risks by the very nature of their calling, and no one would suggest that the courts should be ready to interfere with the practice based upon past experience with regard to such occupational risks, but the risk in the present case was not of this nature. It was obvious, its consequences were likely to be calamitous, and the remedy was simple and available. I do not consider that it is imposing too high a standard of care upon a master to require that he should take the precaution suggested, notwithstanding that no such accident had occurred before in his experience.

Evidence of general practice is often of great value and sometimes decisive, but in such cases as these it may require close examination, and for the reasons which I have endeavoured to state I do not consider the very general practice relied upon in the present case stands up to such examination, or that its more limited application in the case of grain ships can be justified by the standard of the reasonably prudent employer.

There was one factor in the case which weighed with Parker L.J. in the Court of Appeal, to which I should refer. He took the view that if there was any real degree of risk in walking along the 12-foot gangway, then the risk of accident to a man putting up the guard-rail by the edge of the coaming would be, if anything, greater, and in this connexion he referred to the evidence of Captain Lovegrove, a witness for the defence, who had said: "If I had a personal choice myself between sending the seaman "to get a piece of timber from the wing of the deck, and giving "him the job of putting up the guard-rail, and the ship was "rolling, I would choose the former." No other witness had suggested any danger in putting up the guard-rail, but I think the real answer is that the two operations cannot properly be compared. In the first case the man may well not realize that he is in any danger and some slight inattention or slip may precipitate him, and this is the very reason why a guard of some kind is required; in the second operation the danger is obvious and the man or men performing it will have to take the necessary precautions. Moreover, if it is considered to require any exceptional degree of care or skill, men with the necessary qualifications can be chosen. In the one case you have an operation which can be carried out in a few minutes by skilled men, if necessary, and in the other you have all the crew at different times for appreciable periods of the voyage exposed to risks, the degree of which they may very well not fully appreciate. I cannot accept the view that the risk involved in putting up the guard-rail is of such a nature as to justify the omission or that it should turn the scale in favour of the respondents.

My Lords, the degree of care and foresight required from an employer necessarily varies with the circumstances of each case and it is a matter upon which there is scope for much difference of judicial opinion, as this case has shown. I can only say that, in my opinion, Streatfeild J. was fully justified, for the reasons stated by him and for those given by Morris L.J. in the Court of Appeal, in holding that the respondents had been proved to have been in breach of their common law duty to the appellant. I would accordingly allow the appeal and restore the judgment of Streatfeild J.

LORD COHEN. My Lords, I need not recapitulate all the facts. Suffice it to say that, as they strike me, the salient admitted facts appear to be, on the one hand, the size of the gaping hole in the 'tween decks when the hatch is opened, the risk of anyone in the vicinity falling down if he loses his balance, the obvious gravity of the injuries which were likely to be done to anyone who fell through that hole, the easiness of taking the precaution of fixing the stanchion and wire rope fence around the open hatch and the fact that the saving of time in not erecting it was negligible; on the other hand, the width of the passage, some 12 feet, between the stack of dunnage and the open hatch, the fact that only seamen would be passing along that passage, the fact that, according to the evidence, it was not the practice aboard grain ships to fence in open 'tween deck hatches or cover them up after the holds had been made ready for reloading, and the fact that no evidence was given of any occurrence of a similar accident by any of the witnesses, one of whose experience went back some 40 years. There was one disputed fact to which some importance attaches, and that is the frequency with which it was necessary for members of the crew to have access to the 'tween decks after the holds had been made ready. On that point I think it is clear that the learned judge accepted the evidence of the boatswain, Mr. Barker, to the effect that men were often sent down 'tween decks to collect pieces of timber for use in connexion with repair work, and I am not prepared to differ from him on that point.

What is the law to be applied to those facts? Mr. Forrest relied on the observations of Lord Dunedin in *Morton* v. *William Dixon Ltd.*[32] as approved and applied by Lord Normand in *Paris* v. *Stepney Borough Council*[33]: "Where the negligence of the "employer consists of what I may call a fault of omission, I "think it is absolutely necessary that the proof of that fault of "omission should be one of two kinds, either to show that the "thing which he did not do was a thing which was commonly "done by other persons in like circumstances, or to show that "it was a thing which was so obviously wanted that it would "be folly in anyone to neglect to provide it."

I agree with the view expressed by Parker L.J. in the Court of Appeal[34] that the use of the word "folly" may lead to misconception of what the law is if it is read in the sense of "ridiculous," but I do not think this was the sense in which Lord Dunedin used it. Lord Normand, after quoting Lord Dunedin, continued: "The rule is stated with all the Lord President's "trenchant lucidity. It contains an emphatic warning against "a facile finding that a precaution is necessary when there is no "proof that it is one taken by other persons in like circumstances. "But it does not detract from the test of the conduct and judg-"ment of the reasonable and prudent man." I think that the effect of their Lordships' observations is that when the court finds a clearly established practice "in like circumstances" the practice weighs heavily in the scale on the side of the defendant and the burden of establishing negligence, which the plaintiff has to discharge, is a heavy one.

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[32] 1909 S.C. 807, 809.

[33] [1951] A.C. 367, 382.

In applying the law as laid down by Lord Normand to the present case the first question that arises is whether the circumstances existing on board the ships as to which evidence of practice was given are like those prevailing on board the s.s. *Daltonhall.* I share the doubt expressed by Morris L.J. as to whether that was proved to be the case, since both Mr. Burke and the chief officer, Mr. Clark, seemed to say that when any section of the 'tween deck had been swept and cleaned there was ordinarily no more reason to enter the hold, whereas Mr. Barker, as I have already said, deposed that it was often necessary to do so on the *Daltonhall.*

But even if the circumstances can be regarded as like, I should still be of opinion that the appellant is entitled to judgment. Applying the test laid down by Lord Normand, Parker L.J. says[34]: "What, then is the reasonable and prudent employer "bound and entitled to take into consideration? He is certainly "(1) bound to take into consideration the degree of injury likely "to result; (2) bound to take into consideration the degree of "risk of accident; (3) entitled to take into consideration the degree "of risk, if any, involved in taking precautionary measures."

Later on in his judgment he indicates that the decision of the matter in each case must depend on whether, balancing these considerations (and, I would add, taking into account any other factors which may be relevant in a particular case) the plaintiff has proved that the omission of the precaution relied on by the plaintiff was a thing which the defendants, as reasonable and prudent employers, should have thought so obvious that it was unreasonable or imprudent to omit it.

My Lords, I agree with this approach, but, proceeding along those lines, I have arrived at the opposite conclusion to that reached by Parker L.J. There was an obvious risk in being

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[34] [1954] 2 Lloyd's Rep. 507, 518.

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near to the open hatch: it was one to which the plaintiff became exposed in carrying out the duty assigned to him; the consequences of an accident would obviously be very serious; the risk was an unnecessary risk in that it could easily have been avoided and no sort of advantage resulted from its existence. In these circumstances it seems to me that, on the evidence, the trial judge and Morris L.J. were justified in holding that the appellant had established that the respondents had omitted a precaution which, in the sense in which I understand Lord Normand's words, it would be folly to neglect to take.

My Lords, the respondents, as I think wisely, did not press their contention that the damages were excessive, and for the reasons I have given I would allow the appeal and restore the judgment of the trial judge.

Appeal allowed.

Solicitors: *Neil Maclean & Co.; Holman, Fenwick & Willan.*

F. C.

J. C.*
1956
July 24.

KALIKUTTY KANAPATHIPILLAI . . . APPELLANT;

AND

VELUPILLAI PARPATHY . . . . RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF CEYLON.

Bastardy — "Access," meaning of — Absence of personal contact — Evidence Ordinance (Legislative Enactments of Ceylon, 1938 *Rev., c.* 11), *s.* 112.
Ceylon.

By section 112 of the Evidence Ordinance of Ceylon: "The fact "that any person was born during the continuance of a valid "marriage between his mother and any man . . . shall be conclu-"sive proof that such person is the legitimate son of that man, "unless it can be shown that that man had no access to the mother "at any time when such person could have been begotten . . ."

The word "access" in section 112 of the Evidence Ordinance means personal access under such circumstances as might give rise to sexual intercourse, and "no access" would not be established unless the presumption that sexual intercourse had in fact resulted were rebutted by cogent evidence that displaced the presumption.

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* *Present*: VISCOUNT SIMONDS, LORD RADCLIFFE, LORD TUCKER, LORD COHEN, MR. L. M. D. DE SILVA.

Accordingly, where the respondent, a married woman living apart from her husband, applied for an order for maintenance in respect of a child of whom she alleged that the appellant, with whom she said she had had sexual intercourse at the relevant time, was the father, and the evidence established an absence of such personal contact between the respondent and her husband as would give rise to the presumption of sexual intercourse, it was safe and proper to draw the conclusion of " no access."

Jane Nona v. *Leo* (1923) 25 N.L.R. 241, *Sopi Nona* v. *Marsiyan* (1903) 6 N.L.R. 379, *Ranasinghe* v. *Sirimanna* (1946) 47 N.L.R. 112 and *Kiri Banda* v. *Hemasinghe* (1950) 52 N.L.R. 69 considered.

Dictum of Lord Eldon in *Head* v. *Head* (1823) Turn. & R. 138, 140 applied.

The statement in the judgment of the Board in *Karapaya Servai* v. *Mayandi* A.I.R. (1934) P.C. 49, at 50 that "'access' . . . "means no more than opportunity of intercourse" was obiter.

APPEAL (No. 45 of 1955), by special leave, from a decree of the Supreme Court of Ceylon (August 23, 1951), rejecting on a preliminary point the appellant's appeal from a judgment of the magistrate's court of Batticaloa (January 31, 1951), whereby it was adjudged and ordered that the appellant was the father of an illegitimate child born to the respondent on May 24, 1950, and that he should pay the respondent Rs. 30 a month by way of maintenance for the child. The appellant's petition of appeal from that judgment to the Supreme Court (Jayetileke C.J.) was rejected by that court as incompetent on the ground that the petition had been lodged out of time.

The following facts are taken from the judgment of the Judicial Committee: The appeal involved the meaning of the word " access " in a provision of section 112 of the Evidence Ordinance of Ceylon, with regard to which there had been over the years a considerable divergence of opinion in the Supreme Court of Ceylon. The provision read as follows: " The fact that " any person was born during the continuance of a valid marriage " between his mother and any man, or within 280 days after its " dissolution, the mother remaining unmarried, shall be conclusive proof that such person is the legitimate son of that man, " unless it can be shown that that man had no access to the " mother at any time when such person could have been begotten " or that he was impotent."

The respondent brought proceedings under the Maintenance Ordinance against the appellant in respect of a child born to her on May 24, 1950. The relevant facts were as follows: The respondent was married about nine years before the hearing to

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one Mylvaganam. He left her after a few years—whether two or four was not clear—and went to live with another woman at a village called Annamalai, some three or four miles from Kallar, where the respondent was living at all material times. For five or seven years before the hearing the respondent and her husband had been living apart and during that time three children were born to Mylvaganam's mistress.

For present purposes it could be taken that the only relevant facts were (1) that in August, 1949, the respondent was living at Kallar, where she had sexual intercourse with the appellant in his house in which she was residing with him and his wife and daughter; (2) that at that time Mylvaganam was living with his mistress and children at Annamalai, some three or four miles distant. To those facts must be added the uncontradicted evidence of the respondent, accepted by the magistrate, that she had never seen her husband from the time he left her.

1956. June 20, 21. *Stephen Chapman Q.C.* and *John Stephenson* for the appellant. The only question left in the appeal is the effect, on its true interpretation, of section 112 of the Evidence Ordinance. There has been an acute division of judicial opinion in Ceylon on whether the word "access" is used in the section in the sense of actual sexual intercourse or as meaning opportunity for sexual intercourse. It is a somewhat vague word and would appear to be capable of both collocations, but it is submitted that it means no more than opportunity or possibility of intercourse, and the decisions in Ceylon at first so held. Even if on its true construction "access" ought to be construed as meaning sexual intercourse, then on the facts of this case, and having regard to the extremely heavy burden which is imposed by this presumption set out in section 112, the evidence fell a long way short of discharging the burden. It is a presumption for the benefit of the child, and it is for that reason that the law has insisted that the legitimacy of a child can only be upset if there is very cogent evidence to that effect. The standard of evidence is that applicable to criminal charges.

"Opportunity of sexual intercourse" may be defined as meaning such proximity of the husband and wife as would enable them in the ordinary course of their lives to have sexual intercourse if they wished. Admittedly, there was here no evidence of their having been actually seen together; but there was also a complete lack of evidence directed to rebutting this presumption—and there must be cogent evidence in order to rebut it; otherwise

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it is to be conclusive. The question of the meaning of "access" in the section has been subject to considerable controversy in Ceylon. In *Jane Nona* v. *Leo* [1] it was decided that the word meant "actual intercourse." Subsequently, however, it was held in *Ranasinghe* v. *Sirimanna* [2] that in view of the Privy Council decision in *Karapaya Servai* v. *Mayandi* [3] *Jane Nona's* case [4] could no longer be regarded as binding authority, and that the true interpretation was "possibility" or "opportunity" of intercourse. *Ranasinghe's* case [5] was followed in *Selliah* v. *Sinnammah.*[6] Later, however, Basnayake J. (obiter) in *Pesona* v. *Babonchi Baas* [7] and Swan J. in *Kiri Banda* v. *Hemasinghe* [8] seem to have swung back again to the full bench decision in *Jane Nona* v. *Leo.*[9] It is submitted that the decision of the Privy Council in *Karapaya's* case,[10] based, as it was, on section 112 of the Indian Evidence Act, which is in precisely similar terms to the provisions of section 112 of the Ceylon Evidence Ordinance, except for the omission from the Indian Act of the words "or "that he was impotent," is of the highest persuasive authority when considering the law of Ceylon. The inclusion of the words "or that he was impotent" is a strong indication against the word "access" meaning sexual intercourse. [Reference was also made to *Perera* v. *Pody Sinho,*[11] *Sopi Nona* v. *Marsiyan,*[12] *Rabot* v. *De Silva,*[13] *Kalo Nona* v. *Silva,*[14] *Ango* v. *Podisingho* [15] and *Alles* v. *Alles.*[16]] In the last-named case no one argued, and there was no room for dispute, as to what was meant by "access"; the evidence was clear and accepted by both parties that the husband was nowhere near his wife.

The English cases are relevant only in so far as it may be thought that to some extent the draftsman may have had English rules in mind when framing section 112. English cases are here cited to establish (1) what the English law is, and (2) to suggest that the draftsman was plainly not setting out to reproduce English law in the section. There does not seem on this aspect of the case to be any difference between English law and Roman-Dutch law—there is the same basic presumption of legitimacy in each. Perhaps the best of the English cases on the meaning of "access" is the *Banbury Peerage Case*, cited in *Morris* v. *Davies*,[17] in which latter case there was evidence that on different occasions the husband and wife had met. See also *Head* v. *Head*[18] and, on the question of onus of proof, *Hargrave* v. *Hargrave*.[19] The English authorities are applicable having regard to the nature of the presumption which is in question. The standard of the criminal law is applicable—there must be proof "beyond "reasonable doubt." [*Gordon* v. *Gordon*[20] was also referred to.]

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[1] (1923) 25 N.L.R. 241.
[2] (1946) 47 N.L.R. 112.
[3] A.I.R. (1934) P.C. 49.
[4] 25 N.L.R. 241.
[5] 47 N.L.R. 112.
[6] (1947) 48 N.L.R. 261.
[7] (1948) 49 N.L.R. 442.
[8] (1950) 52 N.L.R. 69.
[9] 25 N.L.R. 241.
[10] A.I.R. (1934) P.C. 49.
[11] (1901) 5 N.L.R. 243, 245.
[12] (1903) 6 N.L.R. 379, 381.
[13] (1907) 10 N.L.R. 140, 152; [1909] A.C. 376, 379.
[14] (1912) 15 N.L.R. 508, 510.
[15] (1911) 15 N.L.R. 511.
[16] (1950) 51 N.L.R. 416, 418.

Section 112 is only intelligible on the ground that the draftsman was dealing with opportunity of sexual intercourse when he used the word "access." That view is strongly reinforced by the addition of the words "or that he was impotent." On that test, on the facts of this case there was within that meaning opportunity for sexual intercourse to take place between the husband and the wife. The onus being on the wife to rebut the presumption, the evidence is in no sense sufficient to amount to a discharge of this very serious burden.

The respondent did not appear and was not represented.

July 24. The judgment of their Lordships was delivered by LORD TUCKER, who stated the facts set out above and continued: It is not now contended that there are any grounds for disturbing the findings of the magistrate that the appellant and respondent had sexual intercourse in August, 1949, and that such intercourse resulted in the birth of the child on May 24, 1950, unless the appellant can invoke the provisions of section 112 of the Evidence Ordinance set out above. It is accordingly unnecessary to refer to the evidence upon which the magistrate based his decision on the issue of sexual intercourse between the appellant and the respondent.

The question is whether as a matter of law, as the magistrate held, the facts warrant a finding of no access. It was submitted by counsel for the appellant that "access" in this section means opportunity for intercourse in the geographical sense that it was physically possible for the parties at the relevant time to have had sexual intercourse if they had so desired, and consequently that in order to prove non-access impossibility of the creation of such opportunity must be established.

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[17] (1837) 5 Cl. & F. 163, 244.

[18] (1923) Turn. & R. 138, 140.

[19] (1846) 9 Beav. 552.

[20] [1903] P. 141, 142–143.

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In 1923 this question was considered in Ceylon by a full bench in *Jane Nona* v. *Leo*,[1] where a previous decision in *Sopi Nona* v. *Marsiyan*[2] was overruled and it was held that " access " means " actual intercourse." Subsequently, in 1946, Howard C.J., in *Ranasinghe* v. *Sirimanna*,[3] held that in view of the decision of the Privy Council in *Karapaya Servai* v. *Mayandi*,[4] on the corresponding section of the Indian Evidence Act (which is in identical language save for the omission of the words " or that he was " impotent "), *Jane Nona's* case[5] could no longer be considered as binding on him, and that " access " should be interpreted as meaning " possibility " or " opportunity " of intercourse. This decision was followed in *Selliah* v. *Sinnammah*.[6]

In 1948, however, Basnayake J., in *Pesona* v. *Babonchi Baas*,[7] and in 1950 Swan J., in *Kiri Banda* v. *Hemasinghe*,[8] considering the Privy Council decision on an Indian Act not binding on them, felt themselves free to revert to and follow the full bench decision in *Jane Nona* v. *Leo*.[9]

In this state of the authorities their Lordships consider it is desirable that they should endeavour to state what is in their view the true meaning to be given to this word in the context in which it appears in this Ordinance. They are of opinion that the language of this section, though not purporting or intended to reproduce exactly the English law on this subject, was clearly influenced by the English legal outlook on the subject-matter as disclosed in the authorities in the course of years in which the word " access " so frequently appears.

It is true that the word has not in every case been used in precisely the same sense, but perhaps for present purposes the passage which is most helpful is the one referred to by Basnayake J. in *Pesona* v. *Babonchi Baas*,[10] where he quotes the words used by Lord Eldon in *Head* v. *Head*[11] with reference to the opinion of the judges in the *Banbury Peerage Case*.* It runs as follows: " I take them to have laid down, so as to give it all the weight " which will necessarily travel along with their opinion, although " not a judicial decision, that where access according to the laws " of nature, by which they mean, as I understand them, sexual " intercourse, has taken place between husband and wife, the

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[1] (1923) 25 N.L.R. 241.
[2] (1903) 6 N.L.R. 379.
[3] (1946) 47 N.L.R. 112.
[4] A.I.R. (1934) P.C. 49.
[5] 25 N.L.R. 241.
[6] (1947) 48 N.L.R. 261.
[7] (1948) 49 N.L.R. 442.
[8] (1950) 52 N.L.R. 69.
[9] 25 N.L.R. 241.
[10] 49 N.L.R. 442, 455.
[11] (1823) Turn. & R. 138, 140.
* Nicolas's Law of Adulterine Bastardy and Report of *Banbury Peerage Case* (1836).

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" child must be taken to be the child of the married person, the " husband, unless on the contrary it be proved that it cannot be " the child of that person. Having stated that rule, they go on " to apply themselves to the rule of law where there is personal " access, as contradistinguished from sexual intercourse, and on " that subject I understand them to have said, that where there " is personal access, under such circumstances that there might " be sexual intercourse, the law raises the presumption that there " has been actually sexual intercourse, and that that presumption " must stand, till it is repelled satisfactorily by evidence that " there was not such sexual intercourse."

Their Lordships are of opinion that the significance of the words " no access " in section 112 of the Evidence Ordinance is not fully conveyed by assigning a precise verbal definition to the word " access " itself. They are satisfied that a test which considers merely the bare geographical possibility of the parties reaching each other during the relevant period must be rejected completely. Taken at its face value such a test could hardly ever exempt a husband from the onus of paternity and could work real injustice in many cases. Again, their Lordships are of opinion that " no access " would be established in any case in which, on the evidence available, it was right to conclude that at no time during the period had there been " personal access " of husband to wife in the sense given to that phrase in the passage from Lord Eldon's judgment which has been quoted above. On the other hand, if the evidence in a case did disclose that at any time during the period there had been such personal access—and it must be remembered that the section may often have to be applied when there has been no separation between the married pair—then " no access " would not be established unless the presumption that sexual intercourse had in fact resulted were rebutted by evidence that displaced the presumption. It is only necessary to add that, though the presumption arising from personal access is, as has been said, a rebuttable one, it is in the nature of things that nothing less than cogent evidence ought to be relied on for this purpose.

Applying this test to the facts as found by the magistrate, it is clear that the absence of such personal contact as would give rise to the presumption of sexual intercourse was established and his order consequently justified. His finding would equally be unassailable if non-access required positive proof of no actual sexual intercourse.

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Their Lordships do not consider that this decision in any way conflicts with the judgment of the Board in *Karapaya* v. *Mayandi*,[12] where the finding that the appellants had failed to establish non-access at the material date, December, 1911, could be justified on either view of the meaning of the word " access." It is true that, in delivering the judgment of the Board, Sir George Lowndes said[13]: " It was suggested by counsel for the " appellants that ' access ' in the section implied actual cohabita- " tion, and a case from the Madras reports was cited in support " of this contention. Nothing seems to turn upon the nature of " the access in the present case, but their Lordships are satisfied " that the word means no more than opportunity of intercourse."

This shows that their expression of opinion was purely obiter. Moreover, the judgment does not define precisely what is meant by " opportunity of intercourse " and certainly lends no support to the appellant's test of bare geographical possibility.

As was said in the judgment of the Board in the recent case of *Alles* v. *Alles*[14]: " The issue remains whether on the whole " of the evidence made available it can safely be concluded that " there was no access at a time when the child could have been " conceived."

In the present case their Lordships are of opinion that the conclusion of " no access " was one which it was safe and proper for the magistrate to draw, and they will accordingly humbly advise Her Majesty that this appeal should be dismissed.

Solicitors: *Darley, Cumberland & Co.*

C. C.

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[12] A.I.R. (1934) P.C. 49.

[13] Ibid. 50.

[14] (1950) 51 N.L.R. 416, 418.

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Mar. 1.

[HOUSE OF LORDS.]

A. V. POUND & CO. LTD. . . . . APPELLANTS;

AND

M. W. HARDY & CO. INC. . . . . RESPONDENTS.

Sale of Goods—F.O.B.—Export licence—Contract made in London—F.A.S.—Goods to be shipped from Portugal—Export licence required—Obtainable only by suppliers—Duty to obtain licence—Whether on buyers or sellers.

By a contract made in England buyers agreed to buy from sellers a quantity of Portuguese turpentine f.a.s. buyers' ship at Lisbon, the destination being to the sellers' knowledge a port in Eastern Germany. Under Portuguese law turpentine could not be exported without an export licence obtainable only by the sellers' suppliers who were not disclosed to the buyers. The sellers applied unsuccessfully to the appropriate government board for a licence to export to the desired port, so that the turpentine could not be delivered f.a.s. the ship chartered for that port sent by the buyers. Each party to the contract alleged that the other was in default in failing to obtain the licence:—

Held, that there was no general rule that where there was a prohibition on export without licence, then, on an f.o.b. or f.a.s. contract the buyer must supply a ship into or alongside which the goods could legally be placed; the obligations depended on the contract and the surrounding circumstances in each case. Here the sellers knew the desired destination and only their suppliers, whom they had not disclosed to the buyers, could apply for the necessary licence. Accordingly it was for them to do their best to obtain the licence for East Germany through the suppliers and, if they could not do so, further performance of the contract by the buyers was excused.

H. O. Brandt & Co. v. *H. N. Morris & Co. Ltd.* [1917] 2 K.B. 784 distinguished.

Decision of the Court of Appeal [1955] 1 Q.B. 499; [1955] 1 All E.R. 666 affirmed.

APPEAL from the Court of Appeal (Lord Goddard C.J., Singleton and Romer L.JJ.).

This was an appeal from an order of the Court of Appeal dated February 25, 1955, reversing an order of McNair J. dated November 12, 1954, on an award in the form of a special case stated for the decision of the court by the appeal committee of the London Oil and Tallow Trades Association dated April 20,

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* *Present*: VISCOUNT KILMUIR L.C., VISCOUNT SIMONDS, LORD MORTON OF HENRYTON, LORD REID and LORD SOMERVELL OF HARROW.

1954. The order of McNair J. reversed a finding of the appeal committee that the contract in question had been discharged by frustration and affirmed an alternative award in favour of the present appellants, A. V. Pound & Co. Ltd. (hereinafter called "the sellers") for a sum in United States dollars equivalent to 300,000 Portuguese escudos and certain costs. The order of the Court of Appeal affirmed the finding of the appeal committee that the contract had been frustrated and restored its award in favour of the present respondents, M. W. Hardy & Co. Inc. (hereinafter called "the buyers"), for certain costs, and gave them the costs of the hearings before McNair J. and the Court of Appeal. The award of the appeal committee had reversed the award, dated June 26, 1951, of the two arbitrators who had awarded the sellers a sum in dollars equivalent to 300,000 escudos. The position, therefore, was that the arbitrators and McNair J. held that the contract was not frustrated and that the sellers were entitled to damages; the appeal committee and the Court of Appeal held that the contract was frustrated and that the sellers were not therefore entitled to damages. The Court of Appeal gave leave to appeal to the House of Lords.

The facts, stated by Lord Kilmuir L.C. and Viscount Simonds, were as follows: The sellers were merchants carrying on their business in London; the buyers were a company incorporated in the United States of America but having a branch in London with which the contract to be presently mentioned was made.

By an oral contract made on April 19, 1951, the terms of which were confirmed in a sale note dated April 20, 1951, between the appellants as sellers and the respondents as buyers, the sellers agreed to sell and the buyers agreed to buy 300 metric tons of Portuguese gum spirits of turpentine at a price in United States dollars equivalent to 11,000 escudos per 1,000 kilos net. f.a.s. buyers' tank steamer at Lisbon during the second half of May, 1951, payment by confirmed irrevocable credit in sellers' name in Lisbon. The contract was made in London, in English, and provided for arbitration in London. The buyers required the goods for shipment to Rostock; the sellers knew at the time of the contract that they were destined for Eastern Germany and within a very short time thereafter that the destination was Rostock.

On April 20, 1951, the sellers wrote to the buyers: "We "refer to our recent telephone conversations on the subject of "Portuguese turpentine, and now have pleasure in sending you "herewith our contract [the sale note referred to above] covering

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"the sale of 300 tons, for second half of May shipment, at "Esc. 11,000—per 1,000 kilos, nett f.a.s. tanker at Lisbon. As "we understand that the destination will be Eastern Germany, "payment will be required in free dollars, and subject to our "sellers' approval, we suggest that this should be done at the "rate of exchange ruling on the day the credit is opened."

By the law of Portugal, in force at all material times, including at the date of the contract: (i) It was unlawful to export turpentine from Portugal without an export licence stating the destination of the goods and issued by the Junta Nacional dos Resinosos on behalf of the Portuguese Government. (ii) A licence for the export of gum spirits of turpentine from Portugal could only be obtained by a supplier registered by the Portuguese authorities with the Junta for that purpose. (iii) Gum spirits of turpentine for export could not be delivered alongside ship at Lisbon unless they had been cleared through the Portuguese Custom House where the necessary export licence was required to be produced.

Neither the buyers nor the sellers were suppliers registered under Portuguese law for these purposes, and neither of them could have applied for a Portuguese export licence for the contract goods. There was no express term of the contract as to which, if either, party was under the duty of obtaining or taking steps to obtain an export licence for the export of the goods from Portugal, and there was no express provision in the contract as to the liability of either party should an export licence not be obtained.

On April 19, 1951, the buyers chartered the tanker *Elizabeth B* to proceed to Lisbon and ship the goods to Rostock in Eastern Germany upon payment by the buyers of the sum of £2,875.

Having entered into the contract with the buyers, the sellers on April 23, 1951, contracted to buy from a Portuguese company known as Uniao Resineira Portuguesa (hereinafter called "the "suppliers") who agreed to sell to the sellers 300,000 kilos of Portuguese gum spirits of turpentine at the price of 10,800 escudos per 1,000 kilos netweight, less 2 per cent., delivery f.a.s. the tanker steamer Lisbon for shipment during the second half of May, 1951. This contract contained the following express term: "Subject to usual agreement of the Junta Nacional dos "Resinosos being granted." It also contained a term for payment of the price in United States dollars. The suppliers were registered with the Junta in accordance with the provisions of

Portuguese law and were entitled to apply to the Junta for an export licence relating to the goods.

The sellers did not at that time or until about May 8, 1951, inform the suppliers that the destination of the goods was Eastern Germany. On the instructions of the sellers the identity of the suppliers was not communicated to the buyers.

On May 4, 1951, the buyers by letter advised the sellers that they had chartered the *Elizabeth B* for the purposes of the contract, sending therewith to the sellers a copy of the charterparty which they had entered into with the owners of the *Elizabeth B*. The charterparty showed that the *Elizabeth B* was chartered for a voyage from Lisbon direct to Rostock and that the lay days should not commence before May 20. On May 7 they gave advance notice of readiness to load at Lisbon on May 24/25. The *Elizabeth B* arrived at Lisbon on May 27, 1951, and was ready to load on May 29, 1951. On May 14, 1951, the contract goods were at Lisbon awaiting to be passed through the Portuguese customs, a passage which could not be granted until an export licence had been obtained. On May 22, 1951, the buyers opened a letter of credit in favour of the sellers which provided that it should be drawn upon against delivery of, inter alia, bills of lading covering shipment from Lisbon to Rostock. The terms of the letter of credit were accepted by the sellers.

On May 22, 1951, the suppliers applied to the Junta for an export licence for the goods to enable them to be exported to Rostock, in Eastern Germany. On May 24, 1951, the Junta refused the suppliers' application for the export licence. The effect in Portuguese law of such refusal was to frustrate the contract which had been made between the sellers and the suppliers.

On or about May 25 a new contract was made between the same parties for the sale and purchase of the same amount of turpentine upon the same terms as the previous contract except that there was no provision for payment in United States dollars.

On or before May 29 the sellers wrote a letter to the buyers in which, after referring to recent telephone conversations, they said: "In our opinion the refusal of the Portuguese authorities "to grant an export licence for Rostock does not invalidate the "contract which calls for delivery 'f.a.s. buyer's tank steamer "'in Lisbon.' The turpentine is available for immediate delivery "and we must ask you to let us have, today, new instructions for "shipment of the goods."

This letter brought a response on the same day from the buyers, in which they said that in no circumstances were they prepared to give shipping instructions for any other port than Rostock. The goods, they said, were bought for that port and confirmed by the sellers for shipment to Eastern Germany, and their inability to ship the goods to Eastern Germany constituted a breach of contract for which the buyers would hold them responsible for any damage suffered by them. They added, amongst other things, that they would hold the sellers liable for any damage sustained by them through cancelling the charter of the steamer *Elizabeth B*. They in fact cancelled that charter on the same day, paying to the owners the sum of £780 as compensation.

In order to mitigate the damages the sellers then instructed the suppliers to apply for a licence to export the goods to London and this was granted the same day. The sellers also chartered the *Elizabeth B* and sent the goods to London. The goods were loaded and the ship sailed from Lisbon at 4.15 p.m. on May 31.

T. G. Roche Q.C. and *Andrew Bateson* for the appellants, the sellers. The obligation was on the buyers to obtain any necessary licence. In the case of a free alongside (f.a.s.) contract the buyers must provide a ship alongside which the goods can legally be placed, and it follows that it is for them to obtain the necessary licence. The sellers' obligation only arises when an effective ship has been provided by the buyers. Here the buyers did not provide an effective ship but a ship bound for an unlawful destination. The buyers' failure to obtain a licence constituted a breach of the contract. This follows from *H. O. Brandt & Co.* v. *H. N. Morris & Co. Ltd.*[1] and particularly from the judgment of Scrutton L.J. The principles of that case apply to the present case just as much as to a free on board (f.o.b.) contract. *In re Anglo-Russian Merchant Traders Ltd. and John Batt & Co. (London) Ltd.*,[2] referred to in that case, was a cost, insurance and freight (c.i.f.) contract.

The proper law of this contract is English law and the obligation must be determined by that law. There is a difference between obligation and mode of performance: *Mount Albert Borough Council* v. *Australasian Temperance and General Mutual Life Assurance Society Ltd.*[3] The impact of Portuguese law here is restricted to mode of performance.

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[1] [1917] 2 K.B. 784, 798.

[2] [1917] 2 K.B. 679.

[3] [1938] A.C. 225; 54 T.L.R. 5; [1937] 4 All E.R. 206.

The buyers cannot invoke the doctrine of frustration. The contemplation of one party known to the other is not necessarily an implied term of the contract: see *Twentsche Overseas Trading Co.* v. *Uganda Sugar Factory Ltd.*[4] and *Herne Bay Steam Boat Co.* v. *Hutton.*[5] In the present case there is nothing in the contract to indicate that shipping the goods to Rostock was an essential purpose of the parties. Before frustration can be held to have occurred one must find that the thing made impossible was an essential purpose of both parties and that a reasonable man would say that if that failed, the contract ended. If a man ordered clothes from his tailor for his wedding, and it did not take place, the contract would not go off.

The refusal of a licence for export to East Germany did not render the contract incapable of legal performance by the law of Portugal so as to discharge it. The buyers failed in their implied obligation to do what was reasonable to co-operate with the sellers in obtaining a licence. When the licence for export to Rostock was refused, there was a contractual obligation on the buyers to arrange for some other destination for which a licence might have been obtained, and their failure to do so was a breach of the contract: *Anderson* v. *Commercial Union Assurance Co.*,[6] *Waugh* v. *Morris*[7] and *Duncan* v. *Köster (The Teutonia).*[8] If the contract had been for shipment to Rostock only, the contract would have been frustrated on failure to get a licence for Rostock, but if one single destination is not fixed and a ship can be produced for another destination, the buyers should do so. Here the buyers failed in their obligation because they provided a ship for Rostock without getting the right licence. There is no finding that at the time the sellers entered into the contract they knew the law of Portugal relating to the Portuguese licensing system.

In *Brandt's* case[9] a general principle was laid down covering both f.o.b. and f.a.s. contracts. These are well known in commerce; hundreds are entered into every day. They cover a vast number of different circumstances, cases of two English merchants, of an English merchant or manufacturer and a foreign buyer, of two foreigners, all subject to English law. It helps the commercial community for such a general rule to be laid down. It can be excluded if necessary. It is not material here to deal with the considerations which arose in *Partabmull Rameshwar* v. *K. C. Sethia (1944) Ltd.*[10]

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[4] (1944) 114 L.J.P.C. 25.

[5] [1903] 2 K.B. 683, 688–690; 19 T.L.R. 680.

[6] (1885) 55 L.J.Q.B. 146, 150; 2 T.L.R. 191.

[7] (1873) L.R. 8 Q.B. 202.

[8] (1872) L.R. 4 P.C. 171.

[9] [1917] 2 K.B. 784.

On the assumption that *Brandt's* case [11] was wrongly decided or was distinguishable the buyers were still in breach of their contract. The sellers are claiming damages because the buyers said that the contract was at an end, repudiating it before the time for performance had expired. In justification the buyers rely on (a) frustration and (b) breach by the sellers. But in the contract there was no limit on the buyers' choice of a destination. Bearing in mind that performance must be in accordance with the law of Portugal they could not name an illegal port and then claim that there had been frustration or breach by the sellers. If they could do so, it would enable buyers at the last moment to get out of a bargain they disliked by choosing a destination for which no licence would be granted in any circumstances, so long as they could find anywhere in the world a port which was forbidden by law. In such circumstances the buyers cannot claim that there has been frustration: see *Maritime National Fish Ltd.* v. *Ocean Trawlers Ltd.*[12] and *Duncan* v. *Köster.*[13] The latter is a parallel to the present case. *D. McMaster & Co.* v. *Cox, McEuen & Co.*[14] was a similar case to the present. The observations of Lord Shaw of Dunfermline [15] are particularly in point. The fact that one permitted way of performing the contract is closed does not give rise to frustration. This contract called for delivery in Portugal and so the mode of performance was regulated by Portuguese law. Accordingly, it must have been an implied term that the buyers, being able to nominate any port, would not nominate a port unlawful by the law of Portugal. The buyers, having nominated an unlawful port, cannot prove either breach by the sellers or frustration. It cannot be a breach of the contract because it would be unlawful for the sellers to put the goods alongside a Rostock ship. To establish frustration the buyers would have to show that on its true construction the contract was subject to an implied term that on the happening of a certain event the contract should cease to bind and that that happening had occurred. They say that it was subject to an implied condition that at the time of fulfilment it should be legally possible to export to East Germany. They have not established that there was such an implied condition. The contract on its true construction was completely silent as to such a limitation. The buyers could at any time have nominated another destination. One cannot have unilateral frustration of a contract. There is no finding that the alleged implied term was accepted by either party as a term of the contract.

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[10] [1951] W.N. 389; [1951] 2 Lloyd's Rep. 89.

[11] [1917] 2 K.B. 784.

[12] [1935] A.C. 524, 529–530.

[13] L.R. 4 P.C. 171, 178, 180.

[14] 1921 S.C.(H.L.) 24.

[15] Ibid. 29–30.

Brandt's case [16] was correctly decided and the risk of getting the licence falls on the buyers. There are no sound reasons for distinguishing that case from the present. The fact that the sellers here had made the application for the licence does not affect the question.

It is submitted in the alternative that it was implicit in the contract that the sellers, if they were obliged to obtain a licence, should not be required to perform the contract in a way which is illegal, that the buyers should nominate a port and that, if the licence is refused because the port nominated is an illegal destination, they should nominate another legal port. It is conceded that if it were too late to do so, the contract would be frustrated, but it is for the buyers to establish that, and in the present case there was time to nominate another port. Thus the buyers failed in performing their obligation to take the goods, although they were exportable only to a limited destination.

Leonard Caplan Q.C. and *Neil Lawson* for the respondents, the buyers. The sellers cannot obtain from the House a restoration of the award of damages in their favour unless they establish that the buyers were in breach of the contract. It is for the sellers to show that the reason why the contract was not carried out was the failure of the buyers to perform some contractual obligation resting on them.

There are five ways of putting the case so as to show that it was apart from any breach by the buyers that the contract was not carried out. Inasmuch as there is no finding that the buyers knew of the existence of the export prohibition and the licensing system of Portugal, it is doubtful whether any term relating to licences can be implied.

The basis of the implication of a term in a contract is that it is silent on some matter of which both parties have or are deemed to have knowledge and that both parties intended the term to operate but did not say so in the contract: see *Partabmull Rameshwar* v. *K. C. Sethia (1944) Ltd.*,[17] *per* Jenkins L.J., approved by the House of Lords.

On the basis that there was no implied contract: (1) The contract was never carried out because the sellers failed to carry out their express obligation to put the goods alongside a ship nominated by the buyers. The buyers were entitled to say that they wanted the goods put alongside a ship which, as it happened, was going to Rostock, and there was no term of the contract to prevent their saying so. The goods were not put alongside the ship, because the sellers could not obtain goods which they could put alongside. (2) The contract was not carried out, because it came to an end by frustration. (3) The contract was not carried out, because the sellers wrongfully repudiated the contract by expressing their inability to supply the goods unless the buyers undertook not to ship them to Rostock.

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[16] [1917] 2 K.B. 784.

[17] [1951] 2 Lloyd's Rep. 89, 97–98.

On the basis that there was an implied term: (1) It was implied that the sellers would obtain a licence. (2) There was an implied term that the contract was subject to the obtaining of a licence.

It was the foundation of the contract that the goods were to go to East Germany. On the commercial realities of the situation it would have been unreasonable to impose on the buyers the obligation to do all over again for a new destination the things they had done as preliminaries to dispatching the goods to Rostock. The parties had accepted certain modes of performance of the contract as proper and each had altered their position accordingly.

So far as the sellers were concerned, the appropriate currency for payment if the goods were going to East Germany was dollars; this would not have been appropriate if they were going to England. It is a clear inference from the facts that the sellers dealt in these goods in the market and it is fair to assume that they knew of the Portuguese licensing system. Before making the contract with the buyers the sellers were told, and knew, that the goods were required for export to East Germany, and they framed their payment terms accordingly and made arrangements with their suppliers on the same footing as to payment in a currency appropriate to goods destined for East Germany. This was the fundamental basis of the contract. The nomination of the ship took place on May 4. The nomination with the further information in the charterparty that she was going to Rostock was accepted by the sellers as a proper mode of fulfilling the buyers' obligations under the contract. The sellers required a letter of credit to be opened in dollars because they accepted the buyers' mode of performance, the nomination of Rostock as the destination. The letter of credit had to be opened and details of the mode of payment had to be known before application could be made for a licence. It was in fact opened in accordance with all that had been accepted, viz., shipment to Rostock and payment in dollars. The opening of the letter of credit involved previous arrangements being made in connexion with the necessary consents. The terms of the letter of credit (viz., that it should be drawn upon against delivery of bills of lading covering shipment to Rostock) was accepted by the sellers as a proper mode of performance by the buyers.

The buyers could not have obtained the licence required without giving the name of the sellers' suppliers and the sellers for good commercial reasons would not give it. When on May 29 (two days before the expiration of the contract period) the sellers asked the buyers for a fresh destination they were also impliedly asking for a fresh letter of credit, because without a fresh destination and a new letter of credit no application could be made to the licensing authorities. It is clear that until then the buyers had committed no breach of the contract. It would have been mere speculation to nominate a new destination, because it might have been just as unacceptable to the licensing authorities as the old one. There was no certainty which ports were acceptable and which were not.

Pyrene Co. Ltd. v. *Scindia Navigation Co. Ltd.*[18] shows that the f.o.b. contract is a flexible instrument. There is no standard form of f.o.b. transaction laying down duties which apply to all such contracts. This is also true of f.a.s. contracts. This point bears on the main contention of the sellers that the contract was not carried out because the buyers failed to perform their implied contractual obligation to obtain a licence. They relied on *Brandt's* case,[19] but they based themselves on a misunderstanding of what that case decided. The headnote in stating "*Held*, that the "obligation of applying for a licence lay upon the buyers and not "upon the sellers" was wrong; it was not the decision and it was based on an obiter dictum of Scrutton L.J. It was not necessary to decide that: see *per* Viscount Reading C.J.[20] The duty to apply for a licence might lie on no one. It is not implicit in the decision that there was an obligation on the buyers. Say the parties contract for the sale of goods at a time when the seller has a good supply but later there comes into existence a prohibition on the sale of them save under quota, so that the seller is unable to comply with the contracts into which he has entered; it does not follow that he has to pay damages to someone. So, too, it does not follow because a licensing system comes into force after a contract is entered into that an obligation to obtain a licence falls onto one or other of the parties. In any event *Brandt's* case [21] is distinguishable from the present case. In this case there was an existing licensing system when the contract was entered into; it was otherwise in *Brandt's* case.[21] In *Brandt's* case [21] it was possible for either party to have applied for a licence, but here only the sellers had relations with the only persons who could apply for a licence, the registered Portuguese suppliers. It is no part of the contractual obligation of the buyers in an f.a.s. contract to tell the seller where the ship is going or where the goods are going. It must depend on the surrounding circumstances where the obligation rests in the particular circumstances, and here any duty in that respect could only rest on the sellers and not on the buyers. If it rested on the buyers, it would have the remarkable result of putting on them the risk of obtaining a licence from persons whom they did not know, the suppliers. If an officious bystander had asked the parties what was to happen if a licence could not be obtained, it would not only not be obvious to say that the buyers should pay damages, it would be absurd.

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[18] [1954] 2 K.B. 402, 424; [1954] 2 All E.R. 158.

[19] [1917] 2 K.B. 784.

[20] Ibid. 795.

The sellers also contended that the contract was not carried out by reason of the buyers' failure in their contractual obligation to nominate an effective ship. This is not supported by any authority other than the dictum of Scrutton L.J. in *Brandt's* case.[22] The obligation to provide an effective ship relates to the qualities of the ship itself and not to its destination. The purpose of the contract was the sale of goods for export and not the carriage in the ship, which was subsidiary. The goods could not be exported to Rostock and to put the disability on the ship is to put the matter the wrong way round. It was the goods which were not effective and not the ship.

The sellers further argued that the contract was not carried out because the buyers failed to comply with their implied contractual obligation to do what was reasonable in co-operating with the sellers to obtain a licence. But a term relating to the obtaining of a licence should not be implied where one of the parties knows nothing of the licensing system: see Benjamin on Sale, 8th ed., p. 67, and *Luxor (Eastbourne) Ltd.* v. *Cooper.*[23] There cannot be any intention of the parties to a contract with

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[21] [1917] 2 K.B. 784.

[22] Ibid. 798.

[23] [1941] A.C. 108, 137; 57 T.L.R. 213; [1941] 1 All E.R. 33.

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regard to a matter of which they knew nothing: see *Partabmull Rameshwar* v. *K. C. Sethia (1944) Ltd.*[24] Different principles apply as to frustration: see *Joseph Constantine Steamship Co. Ltd.* v. *Imperial Smelting Co. Ltd.*[25] In frustration cases implied terms are independent of the parties' intentions, but otherwise they do depend on those intentions. However, even if the term contended for is implied, the buyers did co-operate reasonably and were not acting unreasonably in saying that the destination must be East Germany or nowhere.

The sellers also contended that the contract was not performed because the buyers failed to perform their obligations by reason of the fact that they chose an illegal or impossible mode of performance instead of a legal and practicable one. But *Waugh* v. *Morris*,[26] relied on by the sellers, was not a decision that the party in that case was obliged to choose a second way of performing the contract if the way he originally chose became illegal. The question for decision there was whether the contract was void ab initio as being for an illegal purpose. The case does not support the proposition that the buyers were obliged to make a second choice: see *per* Blackburn J.[27]

The sellers also said that the contract was not carried out because the buyers failed to take the goods, which were exportable only to a restricted destination. But the buyers were never in fact offered any goods exportable either to Rostock or anywhere else, and, even if it could be said that they were offered goods exportable to London, these could not be contract goods.

Finally, the sellers contended that the buyers repudiated the contract before the time limited by it had expired and while there were still two days in which it could have been performed. But it was entered into on the common basis and the fundamental assumption, which was of equal concern to both parties, that the goods could be obtained and exported to East Germany. Unless a licence for Rostock could be obtained, the sellers would have no goods to sell. When that common basis disappeared there was frustration of the contract. If there was no frustration, then there was an absolute obligation on the sellers. Even if that obligation was not absolute, the terms of the contract were such as not to impose a liability on the buyers. The buyers did not repudiate the contract by premature cancellation. There was no

[24] [1951] 2 Lloyd's Rep. 89, 98.

[25] [1942] A.C. 154, 183–184, 187; 57 T.L.R. 485; [1941] 2 All E.R. 165.

[26] L.R. 8 Q.B. 202.

[27] Ibid. 206.

more for them to do than they had already done and no obligation to give a fresh destination.

The sellers relied on *Twentsche Overseas Trading Co.* v. *Uganda Sugar Factory Ltd.*,[28] but that was a simple case of an assumption which was not of equal concern to both parties. So, too, in *Herne Bay Steam Boat Co.* v. *Hutton*,[29] also relied on by the sellers, the seeing of the review was of no concern to the shipowners. The same considerations apply in *McMaster's* case,[30] on which the sellers relied. A case with some analogy to the present is *Cunningham* v. *Dunn.*[31]

The analogy of the order for wedding clothes suggested in the argument for the sellers is not applicable. The true analogy would be that of a man instructing his tailor to get special cloth from Italy for him for his wedding clothes and the tailor reporting that Italy would not allow an export licence for the purpose of a wedding but would allow it for the purpose of a funeral. Then, on the appellants' argument, the customer would be obliged to find a funeral to go to.

As to the appropriate measure of damages, if any, these should be limited to the difference between the contract price and the price which the sellers had agreed to pay their suppliers.

T. G. Roche Q.C. in reply. Under an f.a.s. contract the duty of nominating an effective ship and the risk of obtaining or not obtaining an export licence falls on the buyers: *Brandt's* case.[32] The headnote of that case is perfectly correct. It is for the buyers to apply for a licence. What Scrutton L.J. said was not obiter dictum and, even if it was, it would be powerful support. That case is indistinguishable from this. It is implicit in the contract that the buyers and sellers are to co-operate in getting a licence. As to the obligation of applying, it is not a final test of where the obligation rests to see who, in a particular case, does apply: see *Bain* v. *Field & Co., Fruit Merchants Ltd.*[33] In an f.o.b. contract the fact that the buyers may leave it to the sellers to find shipping space does not affect the liability of the buyers to do so; the sellers act as their agents. So, even if it is to be implied from this contract that the sellers are to seek the licence, the buyers are still liable on that point.

Since the contract was to be performed in Portugal, the mode of performance must be governed by Portuguese law and the buyers cannot elect to require it to be performed in an illegal way. The nomination of an illegal destination for the goods is a nullity: *Waugh* v. *Morris*[34] and *Duncan* v. *Köster.*[35]

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[28] 114 L.J.P.C. 25.

[29] [1903] 2 K.B. 683.

[30] 1921 S.C.(H.L.) 24.

[31] (1878) 3 C.P.D. 443.

[32] [1917] 2 K.B. 784.

[33] (1920) 3 Ll.L.Rep. 26.

Frustration depends entirely on the construction of the contract.

Their Lordships took time for consideration.

VISCOUNT KILMUIR L.C. stated the facts and continued: My Lords, it was emphasized on behalf of the appellants that there was no finding that the appellants knew of the Portuguese licensing system at the time when they made the contract.

The first broad issue between the parties is whether it was the duty of the buyers to provide a vessel alongside which the sellers could lawfully place the turpentine, or whether, on the licence for the destination desired by the buyers being refused, the buyers were excused from the performance of the contract.

It was common ground before this House, and it had been so accepted by McNair J. and the Court of Appeal, that the proper law of the contract was English. Mr. Roche submitted that the impact of Portuguese law was restricted to modes of performance in accordance with the limitations which well-known decisions on that subject have indicated.

The sellers' main contention, in accordance with the judgment of McNair J. on which they relied, was that the principles applicable were those laid down by the Court of Appeal in *H. O. Brandt & Co.* v. *H. N. Morris & Co. Ltd.*[1] In that case the goods had been sold f.o.b. Manchester by English merchants to English merchants seeking to export from England. Subsequent to the contract an order rendering a licence necessary was made in the United Kingdom under United Kingdom statutory powers. In these circumstances the court held that it was for the buyer to supply any necessary licence which is required to enable the goods to be placed on the ship.

In my opinion it is necessary to remember in comparing *Brandt's* case[1] with any other in this field (1) that the parties had not contracted with reference to an existing licensing system; (2) that a United Kingdom licensing system overtook their contract; (3) that either party could have applied to the British authorities; (4) that the buyers alone knew the facts which it was necessary to state when a licence was applied for.

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[34] L.R. 8 Q.B. 202, 206.

[35] L.R. 4 P.C. 171, 182.

[1] [1917] 2 K.B. 784.

The appellants, however, argued that the effect of this decision, and especially of the judgment of Scrutton L.J., was that in the case of any f.o.b. contract it was the duty of the buyers to provide a ship in which, and in the case of an f.a.s. contract to provide a ship alongside which, the goods could legally be placed, and therefore their duty to procure any licence required.

In my opinion, the decision in *H. O. Brandt & Co.* v. *H. N. Morris & Co. Ltd.*[1] is authority only for the proposition that where a British buyer has bought goods for export from Britain, and a British prohibition on export except with a licence supervenes, then there is a duty on such a buyer to apply for a licence, because not only is he entitled to apply to the relevant British authority but he alone knows the full facts regarding the destination of the goods. It is not without importance to note that Scrutton L.J. introduces the part of his judgment which deals with this point by saying[2]: "This is a contract to sell 60 "tons of aniline oil f.o.b. Manchester. At the date of the "contract there was no prohibition against the export of aniline "oil. In *In re Anglo-Russian Merchant Traders, Ltd. and* "*John Batt & Co. (London), Ltd.*[3] the contract was a c. and f. "contract, and at the date thereof there was an existing "prohibition against export except under a licence. A question "arose as to whose duty it was to obtain a licence. Bailhache J. "held that the person who had contracted to sell undertook to "obtain the licence or to pay damages. This court held that, as "there was a finding of fact that the seller had done all in his "power to get a licence, at any rate, his obligation was not "higher than that, and that therefore he was not liable. In this "case it becomes necessary to go further and to decide whether "in this f.o.b. contract the obligation to obtain a licence, in case "there should after the making of the contract be a prohibition "against export,, lies upon the sellers or the buyers. In my "opinion it lies upon the buyers."

In my view, significance must be attached to the words "in "this f.o.b. contract." Further, it must be observed that the Lord Justice draws attention not only to the fact that one was a c. and f. contract while the other was f.o.b., but also to the fact that in one case the prohibition was existing and that in the other it supervened. It is in the second case that the words following become applicable, namely: "The buyers must

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[1] [1917] 2 K.B. 784.
[2] Ibid. 798.
[3] [1917] 2 K.B. 679.

"provide an effective ship, that is to say, a ship which can legally "carry the goods." Also, in the case of a supervenient prohibition, once it has become the duty of the buyers to obtain the licence and so legalize the ship, it is immaterial that there is a duty on the sellers to perform the act subsidiary to export, namely, to bring the goods through customs onto the quay.

Moreover, it is, in my view, essential for us, 39 years later, to read that judgment, as Scrutton L.J. was delivering it, in contradistinction to his decision in the *Anglo-Russian* case.[3] I draw attention to the words in which the Lord Justice there posed the problem[4]: "The sellers could only export aluminium "under a licence. They contracted to export it. There are two "alternatives suggested. Have they contracted to get a licence "or pay damages though it may be illegal to export? Or have "they contracted to use reasonable diligence to get a licence, "and, having been unable to obtain one, are they relieved from "any liability because a contract which is illegal cannot be "enforced?" Scrutton L.J. reaches the conclusion that the second of these alternatives is the term that must be implied in the contract.

Against that background I cannot extract from *H. O. Brandt & Co.* v. *H. N. Morris & Co. Ltd.*[5] a general rule that on every f.o.b. or f.a.s. contract the buyer must supply a ship into which, or alongside which, the goods can legally be placed where there exists a prohibition on export except with a licence.

My view is supported by an examination of the case of *D. McMaster & Co.* v. *Cox, McEuen & Co.*[6] on which the appellants also relied. In that case a firm of jute manufacturers in Dundee accepted order-notes for jute goods dated November 1 and 2, 1917, for a firm of merchants also in Dundee. The notes stipulated for delivery f.o.b. Dundee. There supervened the Jute (Export) Order, of November 23, 1917, which prohibited the manufacture and delivery of jute goods without a permit. Thereupon the sellers wrote to the buyers asking for a guarantee that the goods on order were not to be exported, or, if they were for export, for a Government permit authorizing their manufacture and delivery. The buyers intimated that the goods in question were for export. Thereupon they applied for and were refused a permit for the manufacture of the goods, whereupon they cancelled the contract. In an action for damages by the sellers against the buyers for breach of contract your Lordships'

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[3] [1917] 2 K.B. 679.
[4] Ibid. 688–689.
[5] [1917] 2 K.B. 784.
[6] 1921 S.C.(H.L.) 24.

House held that the buyers were liable in damages. In his opinion Lord Birkenhead said[7]: "I find that it [the agreement] "is one in which a vendor has undertaken to supply a certain "article to a purchaser. He is not concerned to ask, and he "does not ask, in what market the purchaser proposes to dispose "of that which he buys, and I have already pointed out that "every attempt to show that the vendor was affected with any "knowledge that the purchaser intended to dispose of these goods "in a foreign market has failed." Lord Finlay said[8]: "Something was said about the words 'f.o.b.' They, of course, would "be equally applicable to any transit by sea whether coastwise "or to foreign ports; but it appears to me quite impossible to "find in the documents or in the surrounding circumstances "any sufficient foundation for making it a term of the contract "that liberty of export should exist at the time it was to be "performed." Lord Dunedin took as the basis of his concurrence that the right of the buyers to dispose of the goods was a right due to the fact that after delivery they became owners of the goods; Lord Atkinson agreed with him. Mr. Roche, however, placed great reliance on the reasoning of Lord Shaw of Dunfermline,[9] and especially on the terms in which he rejected the view of the majority of the Second Division,[10] that the buyer seemed "to have had a certain recourse at law under which "he could, while holding the seller bound under the concluded "contract, yet assert his own, the buyer's, freedom therefrom." In my opinion, the applicability of that reasoning to a simple contract of sale which was overtaken by such a departmental order does not make it applicable to the facts of this case. The opinions in your Lordships' House do not in my view support a general rule for f.o.b. contracts. The outcome must depend on the contract and the surrounding circumstances in each case.

The appellants can only succeed in this action if they can establish that there was a breach of contract by the respondents. In my opinion, they have failed to do so. The essential facts seem to me to be (1) that the sellers knew that the buyers wished to export to Eastern Germany, and (2) that only the suppliers (whose identity the sellers deliberately withheld from the buyers) could apply for the necessary licence. In these circumstances it was for the sellers to do their best to obtain a licence for Eastern Germany through the suppliers and, if they found that they could not, further performance of the contract was excused.

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[7] 1921 S.C.(H.L.) 26.

[8] Ibid. 27.

[9] Ibid. 29–30.

[10] Ibid. 30.

The appellants also contended that by their letter of May 29, 1951, the buyers repudiated the contract before time for its performance had expired. In view of the position adopted by the sellers in the events which had occurred, I do not think that there is any substance in this point.

In my opinion, this appeal fails and should be dismissed with costs.

VISCOUNT SIMONDS. My Lords, I agree that this appeal should be dismissed. I do not dissent from the view expressed by the Court of Appeal that this case is distinguishable from *H. O. Brandt & Co.* v. *H. M. Morris & Co. Ltd.*[11] If it were not so, the Court of Appeal must have decided this case otherwise. But your Lordships are not similarly constrained, and I will give my own reasons why the appellants' claim is not supportable in law.

[His Lordship stated the facts and continued:] Now the stage was set for the arbitration for which also the contract had provided. Each party alleged that the other had failed to perform its obligations under the contract and claimed damages accordingly. Fortunately your Lordships will not be troubled to examine the allegations by the respondents that the appellants committed a breach of their obligations except so far as it is relevant to determine what those obligations were for the purpose of ascertaining those of the respondents. It is the obligations of the respondents alone with which this appeal is primarily concerned, and as to these it is sufficient for the moment to say that the arbitrators and McNair J. held that the appellants were entitled to damages, whereas the appeal committee (a conventional tribunal of appeal from the arbitrators) and the Court of Appeal held that they were not.

My Lords, the argument has been far-ranging, and in particular there has been much discussion whether the doctrine of frustration can be invoked by the respondents to excuse the non-performance by them of their obligations. In my opinion, it is unnecessary to traverse this field: the case can be determined by a brief consideration of the respondents' obligations.

I have stated the relevant terms of the contract and two things are at once obvious; first, that it did not provide for an export licence being obtained by anyone and was not made conditional (as was the contract with the suppliers) upon such a licence being obtained; and, secondly, that it contained no reservation in favour of the sellers in regard to the "buyers tank "steamer at Lisbon." What, then, was the respondents' obligation? Was it for them to obtain an export licence—to Rostock, if they wanted to ship the goods to Rostock, but, if that proved impossible, then to some other place whether they wanted to ship the goods there or not? Was it for them to provide an "effective ship" (to use a phrase which is taken from *Brandt's* case [11]) meaning thereby a ship having a destination for which an export licence could be granted, a destination, maybe, which was at no time in their contemplation and was commercially useless? I think that I state accurately the substance of the appellants' plea and there is no doubt that, if this was the respondents' obligation, they did not perform it.

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[11] [1917] 2 K.B. 784.

My Lords, it is very clear that this obligation is not imposed on the respondents by an express term of the contract. Is a term, then, to be implied by which it is imposed? I can see no ground for saying that it should be. On the contrary, every circumstance in the case suggests that, if the "officious "bystander" had said at the making of the contract: "Of "course, gentlemen, you intend the buyer to get the export "licence," it must at once have been repudiated by the respondents and probably by the appellants also, who by their conduct showed where they thought that duty lay, and were anxious, too, to prevent the respondents making contact with the suppliers, through whom alone a licence could be obtained. It is, in my opinion, plain that according to the ordinary principles of construction no obligation is to be implied.

As I said some time ago, your Lordships are primarily concerned with the obligations of the respondents, not with those of the appellants. It is therefore unnecessary to determine what is the legal consequence of the sellers undertaking to deliver goods f.a.s. the buyers' ship but failing to do so because they could not get the necessary licence. But the fact that prima facie they have unreservedly undertaken to deliver the goods f.a.s. makes it the more difficult to imply an obligation on the part of the buyers.

I must refer now to another aspect of the argument for the appellants. It will be remembered that on May 29, an export licence for Rostock having been refused on May 24, the appellants wrote to the respondents saying (inter alia) that the turpentine was available for immediate delivery and asking for new instructions for shipment. This was a misleading statement:

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[11] [1917] 2 K.B. 784.

for the turpentine was not available for delivery in the sense of the contract: for no export licence, which was a condition of delivery f.a.s., had yet been obtained. But it was the answer of the respondents refusing to give shipping instructions for any other port than Rostock upon which the appellants rely. This, they say, was a wrongful repudiation of the contract, for in any view two days remained for its performance. I do not think that there is any validity in this plea. The respondents had nominated the port of destination and had provided a vessel to carry the goods there and had further provided a letter of credit negotiable against documents in accordance with the contract. All this was without objection from the appellants. It appears to me that, when, through no default of the respondents, the contract could not be carried out in the manner contemplated by both parties, it was not competent for the appellants to require the respondents to name some other port of destination, for which an export licence might or might not be obtained, and to which, in any case, they had no wish to consign the goods. A refusal by the respondents to do so was not, in my opinion, a wrongful repudiation of the contract. Carried to its logical conclusion, the argument of the appellants meant that under this contract the respondents were bound to consign the goods to some place for which an export licence could be obtained and, if there was only one such place, then to that place however remote and undesirable it might be.

In my opinion, therefore, upon the true construction of this contract and in the light of its surrounding circumstances, the respondents were not in default, and this appeal should be dismissed. I cannot, however, conclude without making some observations upon *Brandt's* case.[11] I do not dissent from the view entertained by the Court of Appeal that that case is in material respects distinguishable from the present case. But I think that it is proper to note that, just as in this case it is not primarily the sellers' obligation which has to be determined, so in *Brandt's* case [11] it was not primarily the buyer's obligation, and to that extent—perhaps a limited extent—the observations of Scrutton L.J. upon the latter's obligation may be regarded as obiter. If they are to be read as laying down a general proposition of law that in every f.o.b. contract, and a fortiori, I suppose, in every f.a.s. contract, the duty of obtaining any necessary export licence primarily falls on the buyer in the absence of any relevant provision in the contract, then, with the greatest respect to a very learned judge, I cannot assent to such a proposition. It appears

[11] [1917] 2 K.B. 784.

to me to beg the question to state that it is the duty of the buyer to provide an "effective ship," meaning thereby a ship which can lawfully carry the contract goods to a named destination. It is equally the duty of the seller to deliver f.o.b. or f.a.s. "effective goods," meaning thereby goods which can lawfully be carried to that destination. It may well seem strange that in a world in which restrictions upon export are a commonplace, the elementary precaution is not taken of providing that any necessary licence should be got by one or the other of the parties. In the absence of such a provision I am not prepared to accept the view that the obligation in all circumstances lies on the buyer. I would not, however, question that, assuming the obligation to be with the seller, the buyer must co-operate by telling him the destination of the contract goods and otherwise as may be reasonable. But these are matters which do not arise for consideration on the present appeal, which, as I have said, should be dismissed with costs.

Lord Morton of Henryton. My Lords, I agree with the two speeches which have just been delivered and also with the speech which is about to be delivered by my noble and learned friend, Lord Somervell of Harrow, and I do not desire to add anything.

Lord Reid. My Lords, I concur.

Lord Somervell of Harrow. My Lords, the facts have already been stated, so I will begin at the time the parties went to arbitration.

The respondents contended that the appellants had committed a breach of contract in that they were unable to deliver the goods f.a.s. Alternatively, that the contract had been discharged by impossibility or frustration.

The appellants contended that the duty to obtain a licence was on the respondents as buyers and the failure to obtain a licence constituted a breach. Alternatively, that when a licence for Rostock was refused the respondents were under a contractual obligation to arrange for some other destination for which a licence was, or might have been, obtained. Their failure to do so was a breach.

The arbitrators found that the respondents were in breach and awarded the appellants damages. The respondents appealed to the board of appeal and application was made for a special case.

Subject to the questions of law, the board decided that the refusal by the Portuguese authorities of a licence operated to discharge the contract. Alternative awards were made on the assumption that there had been a breach by either respondents or appellants.

The special case came before McNair J., the appellants submitting that the respondents were in breach. McNair J., basing himself on a decision of the Court of Appeal, *H. O. Brandt & Co.* v. *H. N. Morris & Co. Ltd.*,[11] held that the duty of obtaining an export licence, or at any rate the risk of failure to obtain the export licence, lay upon the buyers. He found that the contract was not frustrated and upheld the alternative award in favour of the appellants.

The respondents appealed and submitted that the award of the board of appeal should be restored. They did not seek to uphold the alternative award for damages against the appellants as sellers. The respondents succeeded. The court held that the buyers were not in breach and distinguished *Brandt's* case.[11] The appellants appeal to this House. Before the Court of Appeal, as before your Lordships, the appellants must fail unless they establish a breach of contract by the respondents.

It seems to me impossible to maintain that in the circumstances of the present case it was the duty of the respondents to apply for a licence. They were precluded from doing so, as has been stated. If it is suggested that they had a duty to cause the Portuguese suppliers to apply, they could not do this unless they were informed of their name and requested to approach them. They were never so requested, and the appellants took steps to prevent the suppliers' name becoming known to them. It may be said that the question remains whether under the contract the respondents as buyers undertook that a licence would be granted although it was not for them to apply. There are no words in the contract from which, as a matter of construction, such an obligation could be inferred. To suggest that such an obligation should be implied seems to me, on very familiar principles, impossible.

McNair J. relied on the decision in *Brandt's* case,[11] by which, of course, he was bound. In *Brandt's* case [11] the sale was f.o.b. Manchester. The prohibition of export except under licence was subsequent to the contract. Buyer and seller both carried on business in Manchester. Either could apply for a licence. The facts which it was necessary to state when a licence had to be applied for were known to the buyers and not to the sellers

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[11] [1917] 2 K.B. 784.

(Viscount Reading C.J.[12]). The buyers were suing the sellers for non-delivery. There were other issues, but the observations relevant to this point arose from a finding by the trial judge that the defendants who, over a certain period, had, it was said, taken upon themselves the obligation of obtaining a licence, did not make sufficient applications for one and were, therefore, liable in damages. The Court of Appeal held that it was prima facie for the buyer and not the seller to apply and that the sellers had not taken the obligation on themselves. The buyer could not, therefore, get damages for any lack of diligence by the seller. There was no counterclaim, and the court did not decide that the buyer would have been liable in damages if, having applied, a licence had been refused. The decision does not, therefore, assist the appellants.

The appellants seek comfort from certain observations of Scrutton L.J. These observations must be read in the context of the facts. In dealing with this issue Scrutton L.J. said[13]: "In this case it becomes necessary to go further and to decide "whether in this f.o.b. contract the obligation to obtain a licence, "in case there should after the making of the contract be a "prohibition against export, lies upon the sellers or the buyers. "In my opinion it lies upon the buyers. The buyers must "provide an effective ship, that is to say, a ship which can "legally carry the goods. When the buyers have done that the "sellers have to put the goods on board the ship. If that is so, "the obtaining of a licence to export is the buyers' concern. It is "their concern to have the ship sent out of the country after the "goods have been put on board, and the fact that under section 8 "of the Customs and Inland Revenue Act, 1879, as amended by "section 1 of the Customs (Exportation Prohibition) Act, 1914, "a prohibition against export includes a prohibition against "bringing the goods onto any quay or other place to be shipped "for exportation does not cast the duty of obtaining the licence "on the sellers. Bringing the goods onto the quay is merely "subsidiary to the export which is the gist of the licence. In my "view, therefore, in a contract of this kind it is for the buyer "to get the licence. It is further said that, if the duty prima "facie was on the buyers to get the licence, in this case the "correspondence shows that the sellers took upon themselves "the burden of getting it. Having carefully considered the "correspondence I have come to the conclusion that there is

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[12] [1917] 2 K.B. 795.

[13] Ibid. 798.

"nothing in it from which I can say that legally any such "burden is placed on the sellers."

The observations, if general, must be confined to cases where both parties are within the jurisdiction of the licensing authority. I do not say the conclusion is necessarily different if they are not, but different considerations arise. Even so, I think this is an area in which it is impossible to lay down general rules. There might be a licence system based not on destination but on the proportion of a manufacturer's product to be sent out of the country. In such a case the facts necessary to be stated would be known to the producer and not to the buyer. It would seem obvious that in such a case it would be for the seller to apply. There may well be cases in which each party must be ready and willing to co-operate. If, in the present case, the sellers had written to the buyers; told them of the licensing scheme; told them the suppliers' names and asked them to give the name of the destination and the ship to the suppliers, there might well have been an obligation on the buyers to do these things. The appellants invited your Lordships to lay down some general rule. There can be no general rule.

In *D. McMaster & Co.* v. *Cox, McEuen & Co.*[14] the sale was of jute f.o.b. Dundee, and the prohibition of export subject to licence was subsequent to the contract. The buyers wished to export the goods, applied for a licence and were refused. They purported to cancel the contract and were held by this House liable in damages for refusing to accept the goods. The buyers argued unsuccessfully that the terms of the contract or the surrounding circumstances indicated that the goods were bought for export. They failed. Jute might be sold f.o.b. Dundee if the jute was intended for coastwise traffic, and this was, presumably, a normal way of transporting jute to other parts of the country. The contract was, therefore, treated as one to sell goods in Scotland. Whether the buyer was precluded from disposing of them in a particular way did not, on that view, bring the contract to an end. That decision has no application to the point which I have been considering. Here the seller could only buy from the suppliers for export and knew at the time of the contract that the goods were to go to East Germany.

I turn to the alternative claim that the respondents were under a contractual duty, when a licence for Rostock was refused, to nominate another port.

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[14] 1921 S.C.(H.L.) 24.

The principle on which the appellants seek to rely in this submission was clearly stated by Bowen L.J. in *Anderson* v. *Commercial Union Assurance Co.*[15]: "It is clear law that if one "of two things which had been contracted for subsequently "becomes impossible, it becomes a question of construction "whether, according to the true intention of the document, the "obligor is bound to perform the alternative or is discharged "altogether." The appellants sought to derive the principle from *Waugh* v. *Morris* [16] and *Duncan* v. *Köster* (*The Teutonia*).[17] It is unnecessary to consider the complicated facts of those cases and whether the respondents were right in submitting that they do not illustrate the principle, as I accept the principle as laid down in the passage cited.

It is clear that under the contract in the present case the respondents are not restricted as to destination. It is submitted, therefore, that this should be treated as an obligation to nominate port A or port B and so on. If one port becomes impossible by the law of the place of performance, then another must be nominated or there is a breach of contract.

There is little authority on the application of this principle. It seems clear to me that it cannot possibly be invoked as against the respondents on May 29. The appellants had known of East Germany as the proposed destination from the date of the contract. They had known of Rostock from May 4. On May 29 the ship chartered for Rostock had reached Lisbon ready to load and only two days of the contractual period for shipment remained. Assuming the principle might apply at an earlier stage when, for example, a buyer had incurred no expense or obligations in the mode of performance which becomes impossible, it cannot apply in the present case.

As I stated earlier, the appellants can only succeed in this appeal by establishing a breach of contract by the respondents. The two grounds on which they sought to do so fail and the appeal fails. It is therefore unnecessary to decide what would be the position if, in a contract in these or similar terms, the impossibility of getting goods f.a.s. for a particular destination had been discovered at a much earlier stage. It is also unnecessary to decide other points which were referred to in argument. Had the appellants undertaken an absolute obligation to get a licence for any destination? Was their obligation only to take reasonable steps? Apart from the general objection to dealing with points which it is unnecessary to decide, there is, I think, a special difficulty arising from the absence of certain findings. In what one may call prohibition licence cases the knowledge or ignorance of either or both parties may well be a relevant consideration. The prohibition here arises under foreign law and there are no express findings, though, no doubt, inferences might be drawn if necessary.

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[15] (1885) 55 L.J.Q.B. 146, 150; 2 T.L.R. 191.

[16] (1873) L.R. 8 Q.B. 202.

[17] (1872) L.R. 4 P.C. 171.

For the reasons which I have given I would dismiss the appeal.

Appeal dismissed.

Solicitors: *Thomas Cooper & Co.; Crawley & de Reya.*

F. C.

[HOUSE OF LORDS.]

BONNINGTON CASTINGS LTD. . . . APPELLANTS;

AND

WARDLAW . . . . RESPONDENT.

H. L. (Sc.)*
1956
Jan. 17, 18, 19;
Mar. 1.

Factory—Onus of proof—Breach of statutory duty—Cause of injury—Silica dust—Pneumoconiosis—Whether resulting from breach of duty—Grinding of Metals (Miscellaneous Industries) Regulations, 1925 (*S.R. & O.*, 1925, *No.* 904), *reg.* 1.

Factory—Dust—Elimination. Causation—Breach of statutory duty—Onus of proof.

The employment of a steel dresser exposed him to silica dust emanating from the pneumatic hammer at which he worked and also from swing grinders. No dust extraction plant was known or practicable for use with the hammer but, though the swing grinders were fitted with such equipment, they were not kept free from obstruction and in this respect the factory owners were in breach of their statutory duty under regulation 1 of the Grinding of Metals (Miscellaneous Industries) Regulations, 1925. The steel dresser, having contracted pneumoconiosis in the course of his employment, sued them for damages:—

Held, (1) that the onus of proof lay on him to show, by the ordinary standard of proof in civil actions, at least that on a balance of probabilities the breach caused or materially contributed to the injury and not merely that it was possible that the injury

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* *Present*: VISCOUNT SIMONDS, LORD REID, LORD TUCKER, LORD KEITH OF AVONHOLM and LORD SOMERVELL OF HARROW.

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might have been so caused, and (2) that, on the facts of this case, the dust from the swing grinders materially contributed to the disease.

Vyner v. *Waldenberg Brothers Ltd.* [1946] K.B. 50; 61 T.L.R. 545; [1945] 2 All E.R. 547 overruled in so far as it held that the onus is on an employer to show that the breach of a safety regulation was not the cause of an accident.

Decision of the First Division of the Court of Session, 1955 S.L.T. 225 affirmed.

Appeal from the First Division of the Court of Session.

John Harkness Wardlaw, the respondent, claimed damages from Bonnington Castings Ltd., the appellants, for the contraction by him of the disease of pneumoconiosis, which it was eventually admitted by the appellants had been contracted while he was employed by them in the dressing and fettling shop at their foundry. After a proof before answer, Lord Wheatley, the Lord Ordinary, awarded him damages of £2,000. The appellants reclaimed against the interlocutor of the Lord Ordinary in so far as it found them liable in damages, but did not dispute that, if they were so liable, the sum of £2,000 was a reasonable award. On March 25, 1955, the First Division (Lord Carmont and Lord Russell, Lord President Clyde dissenting) refused the appellants' motion for review and adhered to the Lord Ordinary's interlocutor. The Lord President dissented from the decision of the majority, holding that, although the appellants had been guilty of negligence at common law and were in breach of regulation 1 of the Grinding of Metals (Miscellaneous Industries) Regulations, 1925, the respondent had failed to prove that their negligence or their breach of the regulation had caused, or made a material contribution to, his disease. The appellants submitted the interlocutor of the First Division for review. The respondent submitted that that interlocutor was well founded in law and should be affirmed by the House of Lords.

The facts, stated by Lord Reid, were as follows: The respondent was employed by the appellants for eight years in the dressing shop of their foundry in Leith, and while employed there he contracted the disease of pneumoconiosis by inhaling air which contained minute particles of silica. He ceased work on May 12, 1950.

The appellants produce steel castings. These are made by pouring molten metal into moulds which consist of sand with a very high silica content. When the casting has cooled it is freed from sand, so far as possible, and then annealed. The annealed casting has a certain amount of the sand adhering to it or burnt into it and the surface of the casting is somewhat irregular. It is then necessary to remove these irregularities and smooth the surface of the casting, and in the course of doing this any adhering sand is also removed. This is done in the dressing shop by three types of machine. In two of these machines, floor grinders and swing grinders, the means employed are grinding wheels made of carborundum, and in the third a hammer or chisel is driven by compressed air so that it delivers some 1,800 blows per minute. There are several of each type of machine in the dressing shop and all of them produce dust, part of which is silica from the sand which they remove. The particles of this sand are originally sufficiently large not to be dangerous, because it is only exceedingly small particles of silica which can produce the disease—particles which are quite invisible except through a powerful microscope. But either in the annealing process or by the working of these machines or at both stages (the evidence on this is inconclusive) a number of the original particles are broken up and the dust produced by all of these machines contains a certain proportion of the dangerous minute particles of silica.

Most of the dust from the grinders can be sucked into ducts or pipes, but during the time when the respondent contracted his disease there was no known means of preventing the dust from the pneumatic hammers from escaping into the air, and it is now admitted that no form of mask or respirator had then been invented which was effective to protect those exposed to the dust.

Throughout his eight years in the appellants' service the respondent operated one of these pneumatic hammers and he admits that he cannot complain in so far as his disease was caused by the dust from his own or any of the other pneumatic hammers. As there was no known means of collecting or neutralizing this dust, and as it is not alleged that these machines ought not to have been used, there was no breach of duty on the part of the appellants in allowing this dust to escape into the air. The respondent makes no complaint with regard to the floor grinders, because the dust extracting plant for them was apparently effective so far as that was possible, and it seems that any noxious dust which escaped from these grinders was of negligible amount. But the respondent alleged, and it is admitted, that a considerable quantity of dust escaped into the air of the workshop from the swing grinders, because the dust-extraction plant for these grinders was not kept free from obstruction as it should have been. It frequently became choked and ineffective.

Shearer Q.C. and *R. H. M'Donald* (both of the Scottish Bar) for the appellants. The respondent failed to discharge the onus of proving that his contraction of the disease was caused by the appellants' fault or breach of statutory duty or materially contributed to by them. Both in actions for common law negligence and breach of statutory duty the pursuer must prove that there was a breach of duty and that the breach caused the injury: *Wakelin* v. *London & South Western Railway Co.*,[1] *Caswell* v. *Powell Duffryn Associated Collieries Ltd.*[2] and *Stimpson* v. *Standard Telephones & Cables Ltd.*[3]

One should look at the evidence with these passages in view. The whole weight of the evidence shows that the danger to the respondent lay in the operation of the hammer. It was not shown that the dust extraction plant fitted to the swing grinders was always out of commission. On the evidence the respondent has failed to connect causally his ailment with the appellants' negligence. Even if any onus did fall on the appellants (which is not admitted), they have discharged it by showing that on the balance of probabilities the disease was caused by dust from the hammer and not from the swing grinders. The proper inference is that the source of the disability was the former, and it is mere speculation to connect it with the latter. Only if a pursuer proves that he suffered injury, that at the time his employers were in breach of a statutory duty owed to him, that the injury was the thing which the statute was designed to prevent and that there was no other possible source of injury, has he discharged the onus falling on him.

Lee v. *Nursery Furnishings Ltd.*[4] is a decision resting on its own facts and distinguishable. Nothing said in that case affects the ordinary onus of proof. *Vyner* v. *Waldenberg Brothers Ltd.*[5] is also distinguishable, since there, as distinct from the present case, there was no suggestion that the injury could have been caused by other circumstances attributable to working conditions but independent of any breach of duty on the part of the employers. See also *Mist* v. *Toleman & Sons*[6] and *Watts* v. *Enfield Rolling Mills (Aluminium) Ltd.*[7] If the workman had proved that he was suffering from the disease, and that it arose from contact with the swing grinders and that these were not properly guarded, he would have proved his case; but he did not prove that. The onus was on him to show that more dust came from the swing grinders.

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[1] (1886) 12 App.Cas. 41, 47; 3 T.L.R. 233.

[2] [1940] A.C. 152, 160; 55 T.L.R. 1004; [1939] 3 All E.R. 722.

[3] [1940] 1 K.B. 342, 350; 56 T.L.R. 90; [1939] 4 All E.R. 225.

[4] (1945) 172 L.T. 285, 287; 61 T.L.R. 263; [1945] 1 All E.R. 387.

[5] [1946] K.B. 50, 54–55; 61 T.L.R. 545; [1945] 2 All E.R. 546.

On the question of onus Lord Carmont and Lord Russell were wrong and the Lord President was right.

C. W. Graham Guest Q.C. (*Dean of the Faculty*) (of the English Bar, *Q.C.* of the Scottish Bar) and *G. C. Emslie* (of the Scottish Bar) for the respondent. The appellants negligently failed to maintain the dust extraction plant on the swing grinders in an efficient state and thus caused the respondent's disease. The evidence sufficiently links their fault with his injury. No other source of the disease than the appellants' factory was suggested. The inhalation of the dust was the cause of the disease. If the appellants were shown negligently to have contributed a part of the dust which was not negligible, the respondent's case was proved. The extraction plant did not extract the dust which it should have extracted to comply with the regulations. The cause of the injury was not the emanation of the dust but its inhalation. The atmosphere was a guilty atmosphere and the appellants do not absolve themselves from responsibility by saying that the greater part of the dust was contributed by an innocent source, the hammer. The inhalation, the cause of the injury, is not to be confused with the causa sine qua non. Of the dust inhaled the amount contributed by the swing grinders was not negligible or inconsiderable. It is not correct to put on the respondent the onus of proving that more dust came from the swing grinders than from another source. The result of the appellants' contentions would be that in order to succeed the respondent would have to eliminate all innocent sources.

An appliance is not adequate under the Grinding of Metals (Miscellaneous Industries) Regulations, 1925, unless it complies with regulation 1 (*a*) as to hoods, (*b*) as to ducts and (*c*) as to fans. For the greater part of the material time it was not complied with because the ducts were not in position.

Section 4 (1) of the Factories Act, 1937, imposes a high duty on employers with regard to ventilation. The method whereby dust is to be rendered harmless is the circulation of fresh air. The nature of the duty appears from *Ebbs* v. *James Whitson & Co. Ltd.*,[8] a duty to take steps to render the dust harmless, so far as practicable. As to practicability, see *Adsett* v. *K. & L. Steelfounders & Engineers Ltd.*[9] and *Gregson* v. *Hick Hargreaves & Co. Ltd.*[10]

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[6] (1945) 62 T.L.R. 131; [1946] 1 All E.R. 139.

[7] [1952] 1 T.L.R. 733, 734; [1952] 1 All E.R. 1013.

Here the evidence proves the presence of dust in the air and that openings in the wall would have improved the circulation of air, which would have diminished the danger of incurring the disease. On the evidence the ventilation was inadequate. The respondent has proved a causal connexion between the breach of duty as to the swing grinders and the contraction of the disease. He has also proved a breach of duty under section 4 (1) of the Act of 1937.

As to onus of proof, the respondent bases his case on the law stated in *Wakelin's* case,[11] *Stimpson's* case [12] and *Vyner's* case.[13]

Shearer Q.C. in reply. It was not proved that the breakdown of the extraction plant caused a condition rendering the existing ventilation inadequate, so that something more was required in the way of extra ventilation. The ventilation was above the usual standard. The true cause of the disease was the dust from the hammer.

Their Lordships took time for consideration.

Mar. 1. VISCOUNT SIMONDS. My Lords, I have had the advantage of reading the opinion which my noble and learned friend, Lord Reid, is about to deliver and I agree with it in all respects. I shall therefore do no more than move that this appeal be dismissed with costs.

LORD REID stated the facts and continued: My Lords, regulation 1 of the Grinding of Metals (Miscellaneous Industries) Regulations, 1925, provides: " No *racing*, dry *grinding*, or *glazing* " ordinarily causing the evolution of dust into the air of the room " in such a manner as to be inhaled by any person employed shall " be performed without the use of adequate appliances for the

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[8] [1952] 2 Q.B. 877, 886; [1952] 1 T.L.R. 1428; [1952] 2 All E.R. 192.

[9] [1953] 1 W.L.R. 137, 773; [1953] 1 All E.R. 97; [1953] 2 All E.R. 320.

[10] [1955] 1 W.L.R. 1025, 1252; [1955] 2 All E.R. 860; [1955] 3 All E.R. 507.

[11] 12 App.Cas. 41.

[12] [1940] 1 K.B. 342.

[13] [1946] K.B. 50.

"interception of the dust as near as possible to the point of origin "thereof, and for its removal and disposal so that it shall not "enter any occupied room. . . ."

It is admitted for the appellants that they were in breach of this regulation in that for considerable periods dust from the swing grinders escaped into the shop where the respondent was working owing to the appliances for its interception and removal being choked and therefore inadequate. The question is whether this breach of the regulation caused the respondent's disease. If his disease resulted from his having inhaled part of the noxious dust from the swing grinders which should have been intercepted and removed, then the appellants are liable to him in damages: but if it did not result from that, then they are not liable.

The Lord Ordinary and the majority of the First Division have dealt with this case on the footing that there was an onus on the defenders, the appellants, to prove that the dust from the swing grinders did not cause the pursuer's disease. This view was based on a passage in the judgment of the Court of Appeal in *Vyner* v. *Waldenberg Brothers Ltd.*[1]: "If there is a definite "breach of a safety provision imposed on the occupier of a "factory, and a workman is injured in a way which could result "from the breach, the onus of proof shifts on to the employer "to show that the breach was not the cause. We think that "that principle lies at the very basis of statutory rules of "absolute duty" (*per* Scott L.J.). Vyner was working a circular saw when part of his thumb was cut off. The saw failed in several respects to comply with the Woodworking Machinery Regulations, and in particular the guard was not properly adjusted. The accident happened before the passing of the Law Reform (Contributory Negligence) Act, 1945, and the main defence was contributory negligence. The arguments of counsel are not reported, but it does not appear to have been suggested that the accident might have happened, even if the guard had been properly adjusted. There was, however, a question whether the duty to see that the regulations were complied with had been delegated to Vyner. Of course, the onus was on the defendants to prove delegation (if that was an answer), and to prove contributory negligence, and it may be that that is what the Court of Appeal had in mind. But the passage which I have cited appears to go beyond that, and, in so far as it does so, I am of opinion that it is erroneous.

[1] [1946] K.B. 50, 55; 61 T.L.R. 545; [1945] 2 All E.R. 547.

It would seem obvious in principle that a pursuer or plaintiff must prove not only negligence or breach of duty but also that such fault caused or materially contributed to his injury, and there is ample authority for that proposition both in Scotland and in England. I can find neither reason nor authority for the rule being different where there is breach of a statutory duty. The fact that Parliament imposes a duty for the protection of employees has been held to entitle an employee to sue if he is injured as a result of a breach of that duty, but it would be going a great deal farther to hold that it can be inferred from the enactment of a duty that Parliament intended that any employee suffering injury can sue his employer merely because there was a breach of duty and it is shown to be possible that his injury may have been caused by it. In my judgment, the employee must in all cases prove his case by the ordinary standard of proof in civil actions: he must make it appear at least that on a balance of probabilities the breach of duty caused or materially contributed to his injury.

The only authority cited by the Court of Appeal in *Vyner's* case [1] for their statement of the law is a passage from the judgment of Lord Goddard in the Court of Appeal in *Lee* v. *Nursery Furnishings Ltd.*[2]: "In the first place I think one may say this, "that where you find there has been a breach of one of these "safety regulations and where you find that the accident "complained of is the very class of accident that the regulations "are designed to prevent, a court should certainly not be acute "to find that the breach of the regulation was not connected "with the accident, was not the cause of the accident." I agree: a court should not be astute to find against either party, but should apply the ordinary standards. I cannot see in what Lord Goddard said any suggestion that the ordinary onus of proof is to be shifted. I would only add that in at least two subsequent cases (*Mist* v. *Toleman & Sons* [3] and *Watts* v. *Enfield Rolling Mills (Aluminium) Ltd.*[4]) the Court of Appeal, being powerless to overrule a previous decision of that court, were driven to find distinctions which do not appear to me to be satisfactory, and which I doubt whether they would have adopted if they had been convinced of the validity of the general rule.

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[1] [1946] K.B. 50.

[2] (1945) 172 L.T. 285, 287; 61 T.L.R. 263; [1945] 1 All E.R. 387.

[3] (1945) 62 T.L.R. 131; [1946] 1 All E.R. 139.

[4] [1952] 1 T.L.R. 733; [1952] 1 All E.R. 1013.

The medical evidence was that pneumoconiosis is caused by a gradual accumulation in the lungs of minute particles of silica inhaled over a period of years. That means, I think, that the disease is caused by the whole of the noxious material inhaled and, if that material comes from two sources, it cannot be wholly attributed to material from one source or the other. I am in agreement with much of the Lord President's opinion in this case, but I cannot agree that the question is: which was the most probable source of the respondent's disease, the dust from the pneumatic hammers or the dust from the swing grinders? It appears to me that the source of his disease was the dust from both sources, and the real question is whether the dust from the swing grinders materially contributed to the disease. What is a material contribution must be a question of degree. A contribution which comes within the exception de minimis non curat lex is not material, but I think that any contribution which does not fall within that exception must be material. I do not see how there can be something too large to come within the de minimis principle but yet too small to be material.

As the Lord Ordinary did not deal with the case from this point of view, I must deal with the evidence afresh in light of such of his findings of fact as are relevant in this connexion. He said[5]: " Prima facie it would appear that the main source " of injurious silica dust which the pursuer inhaled came from " the dressing processes in which he was engaged at the dressers' " bench over the years." With that I agree. Then he said: " . . . but to succeed in this argument the defenders have to " establish that on the balance of probabilities it was the *only* " source." I have already stated my reasons for not agreeing with that. Then he considered certain evidence and said: " In " the face of that evidence I cannot hold that the silica dust from " the dressing process was the sole source of infection, having " regard to the proximity of the pursuer's place of work to the " swing grinders, unless it is established that the system of " ventilation in the shop was sufficient to carry away the noxious " particles of silica dust and prevent them from being inhaled " by the pursuer." He held that the ventilation was defective and insufficient to do this. I do not think that the ventilation was insufficient to comply with the regulations, but I agree that it did not carry away dust so quickly as to prevent it from floating in the general atmosphere of the shop for some time; probably no system of ventilation would have prevented that.

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[5] 1955 S.L.T. 225, 229.

I think that the position can be shortly stated in this way. It may be that, of the noxious dust in the general atmosphere of the shop, more came from the pneumatic hammers than from the swing grinders, but I think it is sufficiently proved that the dust from the grinders made a substantial contribution. The respondent, however, did not only inhale the general atmosphere of the shop: when he was working his hammer his face was directly over it and it must often have happened that dust from his hammer substantially increased the concentration of noxious dust in the air which he inhaled. It is therefore probable that much the greater proportion of the noxious dust which he inhaled over the whole period came from the hammers. But, on the other hand, some certainly came from the swing grinders, and I cannot avoid the conclusion that the proportion which came from the swing grinders was not negligible. He was inhaling the general atmosphere all the time, and there is no evidence to show that his hammer gave off noxious dust so frequently or that the concentration of noxious dust above it when it was producing dust was so much greater than the concentration in the general atmosphere, that that special concentration of dust could be said to be substantially the sole cause of his disease.

The Lord President was of opinion[6] that there was "no "evidence of any material contribution of noxious dust from the "swing grinders," and I must examine his reason for taking that view. He said: "when the evidence of noxious dust from the "swing grinders is analysed it is not impressive. Much of the "evidence in regard to these machines is related to dust generally, and this body of evidence has misled the Lord Ordinary "into phrases such as 'a fairly constant stream of silica dust in "'the atmosphere over a very extended period.' There is no "such evidence in regard to silica dust. The evidence of fellow-"workmen of the pursuer relates to visible dust and is not "helpful on the vital issue." In this I think that he was mistaken.

It is, of course, true that the only direct evidence related to harmless dust because it alone was visible. But if the larger visible particles hung in the atmosphere for some time, then smaller, lighter and invisible particles emitted by the swing grinders must have hung there even longer. No doubt the amount of noxious dust was very much less than the amount of visible dust. But there is nothing to indicate that the castings dressed with the swing grinders had substantially less

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[6] 1955 S.L.T. 225, 238.

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sand adhering to them than had the castings dressed with the pneumatic hammers or that substantially less noxious dust was produced by the grinders than by the hammers. No doubt the total amount from both sources in the atmosphere was small at any one time, but the combined effect over a period of eight years was to cause the respondent's disease. The importance of the evidence of the fellow-workmen is that it shows that the visible dust and therefore also the invisible dust from the swing grinders was not immediately dispersed, and therefore that the respondent was bound to inhale some of the invisible noxious dust from the swing grinders. On this matter Lord Carmont said[7]: "Even "if the majority of the pursuer's inhalations took place near the "source where the silica dust was produced, i.e., at his hammer, "a minority of inhalations from the general atmosphere of the "shop needlessly contaminated owing to the breakdown of the "extracting hood, duct and fan at the swing grinders may well "have contributed a quota of silica dust to the pursuer's lungs "and so helped to produce the disease." On his view of the onus of proof Lord Carmont did not require to go farther than that. In my opinion, it is proved not only that the swing grinders may well have contributed but that they did in fact contribute a quota of silica dust which was not negligible to the pursuer's lungs and therefore did help to produce the disease. That is sufficient to establish liability against the appellants, and I am therefore of opinion that this appeal should be dismissed.

LORD TUCKER. My Lords, it is, I think, clear from the opinion of the Lord Ordinary that he accepted in substance the evidence of the pursuer's witnesses with regard to the extent of the defective condition of the dust extraction appliances in the swing grinders and that this defective condition had existed over a substantial period of time, if not throughout the whole length of the pursuer's employment. On this basis it follows that the quantity of silica dust discharged into the atmosphere of the shop from this source cannot be disregarded as negligible on the de minimis principle.

In my opinion, the inference to be drawn from these facts is that the silica dust discharged from the swing grinders contributed to the harmful condition of the atmosphere, which admittedly resulted in the pursuer contracting pneumoconiosis, and was therefore a contributory cause of the disease.

[7] 1955 S.L.T. 225, 240.

This was the decision reached by the majority of the judges in the First Division, but in so doing both Lord Carmont and Lord Russell were to some extent influenced by certain decisions of the Court of Appeal in England with regard to the existence of an onus on defenders in cases of alleged breach of statutory duty. The cases actually referred to were *Mist* v. *Toleman & Sons* [8] and *Watts* v. *Enfield Rolling Mills (Aluminium) Ltd.*,[9] but the origin of this supposed onus is to be found in the judgment of the Court of Appeal delivered by Scott L.J. in *Vyner* v. *Waldenberg Brothers Ltd.*,[10] where he said: "If there is a "definite breach of a safety provision imposed on the occupier "of a factory, and a workman is injured in a way which could "result from the breach, the onus of proof shifts on to the "employer to show that the breach was not the cause. We "think that that principle lies at the very basis of statutory "rules of absolute duty." The judgment then went on to cite a passage from the judgment of Lord Goddard in *Lee* v. *Nursery Furnishings Ltd.*,[11] in the course of which he used these words: "In the first place I think one may say this, that where you "find there has been a breach of one of these safety regulations "and where you find that the accident complained of is the very "class of accident that the regulations are designed to prevent, "a court should certainly not be acute to find that the breach of "the regulation was not connected with the accident, was not "the cause of the accident." In the subsequent cases of *Mist* [12] and *Watts* [13] attempts were made to explain and to some extent to modify the actual language of Scott L.J. in *Vyner's* case,[14] but the existence of some onus was recognized.

My Lords, I think it is desirable that your Lordships should take this opportunity to state in plain terms that no such onus exists unless the statute or statutory regulation expressly or impliedly so provides, as in several instances it does. No distinction can be drawn between actions for common law negligence and actions for breach of statutory duty in this respect. In both the plaintiff or pursuer must prove (a) breach of duty and (b) that such breach caused the injury complained of. (See *Wakelin* v. *London & South Western Railway Co.*[15] and *Caswell* v. *Powell*

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[8] 62 T.L.R. 131; 174 L.T. 149.

[9] [1952] 1 T.L.R. 733.

[10] [1946] K.B. 50, 55.

[11] 172 L.T. 285, 287.

[12] 62 T.L.R. 131.

[13] [1952] 1 T.L.R. 733.

[14] [1946] K.B. 50, 55.

[15] (1886) 12 App.Cas. 41; 3 T.L.R. 233.

Duffryn Associated Collieries Ltd.[16]) In each case it will depend upon the particular facts proved and the proper inferences to be drawn therefrom whether the pursuer has sufficiently discharged the onus that lies upon him. In the present case I think he has, and on this ground, and without expressing any view on the subject of the alleged defective ventilation, I would dismiss the appeal.

LORD KEITH OF AVONHOLM. My Lords, this appeal falls, in my opinion, to be decided upon a few material facts established by the evidence in the case. The onus is on the pursuer to prove his case, and I see no reason to depart from this elementary principle by invoking certain rules of onus said to be based on a correspondence between the injury suffered and the evil guarded against by some statutory regulation. I think most, if not all, of the cases which professed to lay down or to recognize some such rule could have been decided as they were on simple rules of evidence, and I agree that the case of *Vyner*[17] in so far as it professed to enunciate a principle of law inverting the onus of proof cannot be supported. The correct principles governing the matter were laid down by this House in *Caswell* v. *Powell Duffryn Associated Collieries Ltd.*[18] and by the Master of the Rolls in *Stimpson* v. *Standard Telephones & Cables Ltd.*[19]

I refer to the facts as set out by my noble and learned friend, Lord Reid. What to my mind determines this case is: (1) that the pursuer is suffering from pneumoconiosis, which is a disease caused by the inhalation of minute particles of silica into the lungs; (2) that it is admitted that the disease was contracted by the pursuer in the course of his employment with the defenders; (3) that he was employed by the defenders as a steel dresser in the defenders' dressing shop for a period of over eight years before the disease manifested itself; (4) that in the dressing shop the pursuer was exposed throughout this period to the action on his lungs of silica dust which pervaded the dressing shop; (5) that part of this silica dust was released into the atmosphere of the dressing shop from the operations conducted at the swing grinders; (6) that a substantial part, if not much the greater part, of the silica dust from the swing grinders was released as the result of repeated negligence of the defenders in failing to keep clear of obstruction the flues or ducts designed to carry away the noxious dust from the swing grinders; (7) that this negligence recurred at very short intervals throughout the whole of the time during which the pursuer was employed by the defenders; (8) that silica dust, when inhaled, is gradual and insidious in its effects and requires to operate on the lungs for a considerable period of time before producing pneumoconiosis.

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[16] [1940] A.C. 152; 55 T.L.R. 1004; [1939] 3 All E.R. 722.

[17] [1946] K.B. 50.

[18] [1940] A.C. 152.

[19] [1940] 1 K.B. 342; 56 T.L.R 90; [1939] 4 All E.R. 226.

On these facts, I think the pursuer has proved enough to associate his illness with the fault of the defenders, or at least to establish a prima facie presumption to that effect. The case for the defenders depends on the fact that the pursuer, as a steel dresser, engaged over the whole period of eight years in operating a pneumatic hammer on steel castings, was exposed much more immediately and in a much greater measure to silica dust released from these castings. I am prepared to agree, as did all the judges in the court below, that the main source of silica dust inhaled by the pursuer came from this operation, a cause for which it is agreed the defenders were in no way to blame. It was accordingly maintained for the defenders that the pursuer must show that the dust released by their negligence from the swing grinders had contributed materially to the dangerous dust inhaled by the pursuer. As there was no evidence to show the proportions of the dust emanating from the various sources in the dressing shop inhaled by the pursuer, his case, it was said, must fail. The pursuer has, however, in my opinion, proved enough to support the inference that the fault of the defenders has materially contributed to his illness. During the whole period of his employment he has been exposed to a polluted atmosphere for which the defenders are in part to blame. The disease is a disease of gradual incidence. Small though the contribution of pollution may be for which the defenders are to blame, it was continuous over a long period. In cumulo it must have been substantial, though it might remain small in proportion. It was the atmosphere inhaled by the pursuer that caused his illness and it is impossible, in my opinion, to resolve the components of that atmosphere into particles caused by the fault of the defenders and particles not caused by the fault of the defenders, as if they were separate and independent factors in his illness. Prima facie the particles inhaled are acting cumulatively, and I think the natural inference is that had it not been for the cumulative effect the pursuer would not have developed pneumoconiosis when he did and might not have developed it at all. The inference, of course, would have been different if it could be shown that the pursuer could not have inhaled any particles given off from the swing grinding operations, or that the particles negligently released from the swing grinding operations were released at intervals so infrequent, or in quantities so insignificant, even if taken cumulatively, as to make it unreasonable to regard them as a material contributing cause of the pursuer's disease. But that, in my opinion, the defenders are unable to show. On the whole evidence, I consider that the pursuer has discharged the onus that is upon him of showing that the defenders' fault was a material contributing cause of his illness. I would accordingly dismiss the appeal.

Lord Somervell of Harrow. My Lords, I agree.

Appeal dismissed.

Solicitors: *Lawrence Jones & Co. for Macpherson & Mackay, W.S., Edinburgh; W. H. Thompson for Donald Shaw & Co., Edinburgh.*

F. C.

[HOUSE OF LORDS.]

STAVELEY IRON & CHEMICAL CO. LTD. . APPELLANT;

AND

JONES . . . . RESPONDENT.

H. L. (E.)*
1955
Nov. 29, 30;
Dec. 1, 5.
1956
Jan. 31.

Negligence—Duty of care—Contributory negligence—Injury caused by fellow workman—Employer's liability—Test of standard of care.
Common Employment. Negligence—Contributory negligence.

A workman, co-operating in the moving of heavy cores by means of a crane, suffered personal injuries. He brought an action against his employers for damages in respect of the negligence of the crane driver. The trial judge, purporting to apply the test for the standard of care laid down in *Caswell* v. *Powell Duffryn Associated Collieries Ltd.* [1940] A.C. 152; 55 T.L.R. 1004; [1939] 3 All E.R. 722, held that, though the accident arose in part from his own error, this did not amount to contributory negligence; applying the same test, he held that the crane driver, though also in error, was not negligent. Accordingly he dismissed the action. The Court of Appeal, holding that negligence on the part of the crane driver was not to be assessed by the same standards as contributory negligence by the workman, reversed this decision. On appeal to the House of Lords:—

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* *Present*: Lord Morton of Henryton, Lord Porter, Lord Reid, Lord Tucker and Lord Cohen.

Held, that on the evidence the crane driver had been guilty of negligence and the employers were responsible for the acts of their servant done in the course of the employment; the injured workman was not guilty of contributory negligence and was accordingly entitled to damages.

The Law Reform (Contributory Negligence) Act, 1945, and the Law Reform (Personal Injuries) Act, 1948, have not altered the standard of care required from workmen and employers and that standard does not differ according to whether the workman is being sued personally or his employer is being sued, by reason of his vicarious liability, for his acts or omissions in the course of his employment or according to whether injury has been caused to a fellow servant or a third party.

Quaere whether the principle in *Caswell's* case that "it is not "for every risky thing which a workman in a factory may do in "familiarity with the machinery that a plaintiff ought to be held "guilty of contributory negligence," in cases of breach of statutory duty, applies to a simple case of common law negligence such as the present where there was no evidence of work-people performing repetitive work under strain or for long hours at dangerous machines.

Decision of the Court of Appeal (sub nom. *Jones* v. *Staveley Iron & Chemical Co. Ltd.*) [1955] 1 Q.B. 474; [1955] 1 All E.R. 6 affirmed.

APPEAL from the Court of Appeal (Denning, Hodson and Romer L.JJ.)

This was an appeal by the appellant company, Staveley Iron & Chemical Co. Ltd., from an order of the Court of Appeal dated December 8, 1954, whereby an appeal by the respondent, Robert Jones, from a judgment of Sellers J. dated June 18, 1954, was allowed and a cross-appeal by the appellant company from part of that judgment was dismissed. Leave to appeal to the House of Lords was granted by the House on March 14, 1955.

The facts stated by Lord Reid and Lord Tucker were as follows: On June 4, 1951, the respondent met with an accident at the appellant company's iron works at Hollingwood in the county of Derby, where he was employed, whilst assisting in the operation of lifting a large iron pan loaded with cores by means of an overhead crane, as a result of which he suffered injuries to his right hand and arm.

On October 1, 1953, he issued a writ against the appellant claiming damages for negligence. In his statement of claim he alleged failure to provide a safe system of work or safe plant and equipment. On that issue he failed at the trial before Sellers J. and that finding was accepted in the Court of Appeal and in the House of Lords. He further alleged in the alternative that Bertha Howett, a servant or agent of the appellant company, who was the driver of the crane, "was negligent in that she: "(*a*) failed to keep a proper look-out; (*b*) failed to take any or "any sufficient steps to ensure that the said crane and/or its "hook was directly over the said load before raising the same; "(*c*) raised the said load at a time when by reason of the fact "that the said crane and/or its hook was not directly over the "said load it was unsafe so to do; (*d*) failed so to manage or "control the said crane as to avoid causing or permitting the said "load to swing towards and trap the plaintiff."

The appellant company in its defence denied the negligence alleged and in the alternative pleaded contributory negligence on the part of the respondent: "The plaintiff was negligent in "that he—(*a*) failed to pay any or any sufficient regard to the "position of the crane crab relative to the position of the pan; "(*b*) failed to ensure that the crane crab was central over the "pan; (*c*) failed, if the crane crab was central over the pan, to "instruct the crane driver to move the crane crab and/or to "indicate to her the place at which the crane crab would be "central over the pan; (*d*) failed, if the pan commenced to swing "or lift abnormally, to signal to the crane driver to lower the "pan; (*e*) failed to stand clear of the pan when it was about to "be lifted and/or during the lifting thereof."

The respondent was an experienced workman, a coremaker. Part of his duty was to move heavy cores from one part of the factory to another. The cores were carried on a pan or tray 6 feet by 4 feet and 1½ feet deep, resting on a bogie which was man-handled along a railway line parallel to another railway line on which stood railway wagons onto which the cores were loaded with the aid of a travelling crane. The distance between the side of the relevant wagon and the pan was 3 feet 9 inches. The crane moved laterally across the factory on overhead girders and its cabin was midway between the two lines, so that the driver was above, but not directly above, the centre of the pan. From the crane there was suspended a large hook or crab from which four chains hung. The pan had to be lifted by attaching one of these chains at each corner. Two men were required to do this and the respondent had brought another man, Groves, to help him. It was the respondent's duty to assist the crane driver by seeing that the sling was dropped as nearly as possible at the centre of the pan, since she was not in a good position to observe this. This was necessary for safe working as otherwise, when the load was lifted, it would swing, as it did in this case. On this occasion the crane driver saw that the load was ready and, without waiting for any signal, lowered the crab so that the chains were within reach of the men. The two men each took two of the hanging chains and fastened them at the corners of the pan. After they had fixed the chains the height of the load of cores prevented them from seeing each other while they were holding the chains clear of the load. They had to hold one chain in place with each hand until the crane took the weight. When the crane driver thought that the men were ready she raised the load and, as it was considerably off centre and nearer the respondent's side of the pan, it immediately swung towards him and caught his arm against a truck standing just behind him. It was proved that the proper practice was not to raise the load at once but only to take the weight on the chains and then to pause to see whether the four chains were equally taut. For some reason which she could not explain the crane driver did not do this.

The following questions and answers appeared in the cross-examination of Cyril Howard, the appellants' works manager:—"*Q*. If you are right, this woman ought not to have moved this "crane to lift the load without receiving a signal, ought she? "*A*. The usual procedure is to take the weight and tighten the "chains. *Q*. The usual procedure is to take the weight, tighten "the chains, and then wait for a signal? *A*. Yes, unless the "crane driver sees that the load is safe and central. *Q*. And if "she went on lifting without waiting for a signal and without "being sure that it was safe and central, she was wrong, was "she not? *A*. I think if the crane driver was over the job and "tightened the chains and took the weight, it would be all right, "she would proceed to do her job. *Q*. If she could not see that "it was safe and central she ought not to lift until she got a "signal, ought she? *A*. Probably not, but the man on the floor "is there to give guidance because she cannot see as well as the "man on the floor. *Q*. What chance has he to give guidance if "she lifted it straight away? *A*. I was not a witness to these "circumstances."

And in the evidence of the crane driver the following appeared, also in cross-examination:—"*Q*. You should of course have taken "the strain on the chain, should you not? *A*. Yes. *Q*. And then "waited for them to see that all was clear? *A*. Yes. *Q*. Once "you take the strain you can see whether your wire from the "crane is straight up and down or at an angle? *A*. Yes. *Q*. If "it is at an angle you move your crane until you have got it "straight, do you not? *A*. Yes. *Q*. But on this occasion I "suppose you forgot just for the moment, and you lifted straight "up without taking the strain. That is right, is it not? *A*. Yes. "*Q*. And then the pan swung across? *A*. Yes. *Q*. And the "reason you did that was because you had not noticed that "Mr. Jones was there. That is right, is it not? *A*. Yes, that "is right. *Q*. And the pan went across and almost touched the "wagon? *A*. Yes."

Sellers J. held that the respondent's behaviour did not amount to contributory negligence according to the test laid down in *Caswell* v. *Powell Duffryn Associated Collieries Ltd.*[1] He then applied the same test to the crane driver's conduct and, holding that she was not negligent, dismissed the action.

The Court of Appeal reversed this decision, holding that the crane driver's mistake was not to be judged by the same standard as that of the workman since, whereas negligence was founded on breach of duty, contributory negligence was not. The employer's duty was a personal duty to take reasonable care for the safety of his servants and the law required a higher standard of care from him than from the injured workman. Accordingly, the respondent was entitled to damages. The appellant appealed to the House of Lords.

Marven Everett Q.C. and *Arthur James* for the appellant company. In effect the Court of Appeal have held that there is no such thing as driving a crane by one's servant since the servant's acts are to be treated as one's own. They have reached their conclusion on a wrong direction to themselves in law.

An employer has a duty to provide a reasonably safe system of work, a duty to take reasonable care to supply proper plant, a duty to take reasonable care to provide competent fellow servants. In such cases the doctrine qui facit per alium facit per se applies. Before the Law Reform (Personal Injuries) Act, 1948, common employment was not an answer to a breach of these duties, but the negligence of this crane driver would have been covered by the doctrine. But since 1948 the employer has been made liable for the negligence of one servant injuring another on the doctrine of respondeat superior. The abolition of the doctrine of common employment has, however, nothing to do with the standard of care

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[1] [1940] A.C. 152; 55 T.L.R. 1004; [1939] 3 All E.R. 722.

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demanded. There cannot be an act or omission of a particular individual which is negligent in the case of that person but would not be negligent in the case of another. Assume that the servant whose act caused the injury was himself also injured by the negligent act of the other injured man. It would be absurd if both could sue the employer, each relying on the other's negligence, while neither could be held guilty of contributory negligence. The servant cannot have it both ways. Either he was negligent or he was not negligent for all purposes or for none. The nature and quality of the man's act does not cease to be negligent because he may urge that as an employee he was guilty only of an act of casual inadvertence, as in *Caswell* v. *Powell Duffryn Associated Collieries Ltd.*[1] An act cannot be an act within the principle of that case for one purpose but not for another. To hold otherwise would be contrary to its principle. *Jones* v. *Manchester Corporation*[2] is not an authority for the proposition for which Denning L.J. quotes it.[3]

Under section 6 of the Law Reform (Married Women and Tortfeasors) Act, 1935, it is a condition precedent to contribution that the contributor must be a tortfeasor. As to the effect of that section, see *Ryan* v. *Fildes*.[4] The fact that a master may be a joint tortfeasor with his servant in respect of the servant's act involves a legal fiction, but the master was not the person who committed the tort. No different standard of care is demanded in assessing the liability of each. If the decision of the Court of Appeal was correct, a workman injured partly through his own carelessness would be able to recover damages from his master, while himself having a defence under *Caswell's* case[5] in respect of his own negligence.

In *Broom* v. *Morgan*[6] (cited by Denning L.J.[7]), in which the argument for the defendant closely followed the submissions for the present appellant, there is nothing to assist the conclusions of Denning L.J. Alternatively, it goes too far. *Stapley* v. *Gypsum Mines Ltd.*[8] is no authority in the present case. *Semtex Ltd.* v. *Gladstone*[9] bears on the question whether an employer is entitled to an indemnity against his servant. The servant's act cannot be regarded as the master's own personal act. See also *Romford Ice and Cold Storage Co. Ltd.* v. *Lister.*[10]

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[1] [1940] A.C. 152.

[2] [1952] 2 Q.B. 852, 866; [1952] 1 T.L.R. 1589; [1952] 2 All E.R. 125.

[3] [1955] 1 Q.B. 474, 480; [1955] 1 All E.R. 6.

[4] [1938] 3 All E.R. 517.

[5] [1940] A.C. 152.

[6] [1953] 1 Q.B. 597, 599, 602, 607–608; [1953] 1 All E.R. 849.

[7] [1955] 1 Q.B. 474, 480.

[8] [1953] A.C. 663; [1953] 2 All E.R. 478.

[9] [1954] 1 W.L.R. 945; [1954] 2 All E.R. 206.

If the Court of Appeal were right, then if three negligent servants were all injured and all brought actions against their employer in three sets of claims, then, on pleas of contributory negligence and claims for contribution being made on behalf of their employer, the court would be confronted with very difficult problems if different standards of negligence were applicable.

Wilsons and Clyde Coal Co. Ltd. v. *English* [11] makes matters simple. The standard of care applicable is that of the reasonably competent crane driver and not some higher standard of care to be attributed to the employer. The personal duty of the employer is to be measured by the standard of the reasonable employer. In the case of the employee the standard is that of the reasonable employee (manager or crane driver, as the case may be). One must not attribute to the crane driver the employer's standard of care. Alternatively, the standard both of the employer and the employee is that of the reasonable man. On *Wilsons and Clyde Coal Co. Ltd.* v. *English* [11] (particularly Lord Thankerton's opinion) the right approach to the present case is to ask: was the crane driver guilty of negligence, tested by the standard of the reasonably competent crane driver? If there is a difference between the standards of the crane driver and the employer, then the former must be applied. Thus the Court of Appeal was wrong in holding that the standard of care required of the crane driver was equivalent to that which would have been required of the employers if they had been driving the crane personally. They did not distinguish between an employer's personal duty and the casual acts, errors of judgment and carelessness of a fellow servant for which an employer may or may not be responsible vicariously on the principle respondeat superior. Since the abolition of the doctrine of common employment there still remain two distinct spheres in which a master may be held liable, his own personal negligence and that of his servant.

As to the contributory negligence alleged against the respondent, the use sought to be made on his behalf of what was said in *Flower* v. *Ebbw Vale Steel, Iron and Coal Co. Ltd.*[12] and *Caswell* v. *Powell Duffryn Associated Collieries Ltd.*[13] would lead

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[10] [1956] 2 Q.B. 180; [1955] 3 All E.R. 460.

[11] [1938] A.C. 57; 53 T.L.R. 944; [1937] 3 All E.R. 628.

[12] [1934] 2 K.B. 132, 140; (H.L.) [1936] A.C. 206.

[13] [1940] A.C. 152, 166.

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to the result that in this class of case, irrespective of the circumstances, one would be obliged to look with a very benevolent eye on the acts of the workman, whereas one should look at the particular circumstances to see whether the man's act should or should not be regarded as negligent: see *Glasgow Corporation* v. *Muir.*[14] One should confine oneself to the exact circumstances intended to be covered by the language used in *Caswell's* case[15] and *Flower's* case.[16] Negligence is a question of fact and not of law. The passage from *Flower's* case[17] relied on by the respondent is not to be treated as a complete definition of contributory negligence. See also *Nance* v. *British Columbia Electric Railway Co. Ltd.*[18] and *Latimer* v. *A.E.C. Ltd.*[19]

In this case Sellers J. in his judgment, looked at as a whole, was asking himself the right questions. Unless the House of Lords feels that he misdirected himself in law, or was plainly wrong, his decision should remain undisturbed.

The test of negligence is the quality of the act itself together with the damage which could reasonably be foreseen, its likelihood and its extent.

Arthur James following. A combination of errors by the crane driver and the respondent produced this accident and one must ask: who was negligent, if anybody? One must not attribute to the employer a higher standard of care than to his servants. The principle in *Caswell's* case,[20] as stated by Lord Wright, is to be treated as of general application and can be used, not only as a shield against liability for contributory negligence, but also in resisting a claim for damages. Alternatively, the principle must be restricted to the sort of circumstances which prevailed in *Flower's* case[21] and *Caswell's* case,[22] where a workman was working on his own without a foreseeable risk of damage to any other person. If the principle of *Caswell's* case[22] is applicable both to the respondent and to the crane driver, then the conclusion of Sellers J. was right. See also Cambridge Law Journal, 1955, pp. 151 and 154, Notes on Negligence, Standard of Care and Vicarious Liability, by K. W. Wedderburn.

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[14] [1943] A.C. 448; 59 T.L.R. 266; [1943] 2 All E.R. 44.

[15] [1940] A.C. 152.

[16] [1934] 2 K.B. 132; (H.L.) [1936] A.C. 206.

[17] [1934] 2 K.B. 132, 140.

[18] [1951] A.C. 601; [1951] 2 T.L.R. 137; [1951] 2 All E.R. 448.

[19] [1953] A.C. 643, 653; [1953] 2 All E.R. 449.

[20] [1940] A.C. 152, 175.

[21] [1934] 2 K.B. 132; [1936] A.C. 206.

[22] [1940] A.C. 152.

F. W. Beney Q.C. and *David Turner-Samuels* for the respondent. This is really a simple case but for the introduction by Sellers J. and later by the Court of Appeal of considerations whether the abolition of the doctrine of common employment affected a master's liability to his servants. But this case can and should be decided on its own facts. The respondent was injured because the tray trapped his hand. That was due to the crane being hoisted when the tray was well out of centre. Had the crane driver followed the normal procedure there would have been no accident. The crane driver gave no excuse for omitting to wait for the signal. The appellants failed to prove even an error of judgment on the part of the respondent. His action was not a direct cause of the accident. There was no evidence that he was under a duty to the crane driver. The point of law was unnecessarily introduced by Sellers J. and there is, on the evidence, no need to consider whether or not the views expressed by Denning L.J. in the Court of Appeal were well-founded, because on the facts the respondent's injury was solely due to the crane driver's neglect of reasonable care. No relevant omission on his part affected the crane driver, amounted to negligence or contributed to his injury, whereas the quality of the crane driver's actions were clearly calculated to involve risk of injury to him.

The doctrine of common employment was modified by section 1 of the Employers' Liability Act, 1880, and abolished by the Law Reform (Personal Injuries) Act, 1948. The effect is now to place the workman in the same position as a third party. But an extra duty may be imposed on an employer by his knowledge of certain facts relating to the employee: see *Paris* v. *Stepney Borough Council.*[23]

It is not right to test the standard of care owed by servant A, whose act or omission causes injury to servant B or a third person, by the test of contributory negligence laid down in *Caswell's* case.[24] To hold otherwise would be to bring back the doctrine of common employment. In an action brought against an employer by a servant injured by a fellow servant the employer cannot rely on the doctrine in *Caswell's* case,[24] because it is he himself who has set the servant causing the injury to work long and tiring hours.

The distinction attempted on behalf of the appellant between respondeat superior and qui facit per alium facit per se is ill-founded. The two maxims are different aspects of the same problem: see *Hutchinson* v. *York, Newcastle and Berwick Railway Co.*,[25] *Bartonshill Coal Co.* v. *Reid*[26] and *Wilsons and Clyde Coal Co. Ltd.* v. *English*.[27] The last-mentioned case is not the same as the present case, and Lord Thankerton was not dealing with the distinction here attempted. Here one does not need to put the employers in imagination in the crane, but one must treat their responsibility as if they had been there. In this case Denning L.J. was right in his approach although, on the facts, it was not necessary to go into the law. Contributory negligence is not the same as other negligence. In the case of the former, factors must be taken into consideration which are not to be taken into consideration in the case of the latter. As to the greater responsibility of the employer than the workman for the consequences of the latter's mistake referred to by Denning L.J.,[28] *Jones* v. *Manchester Corporation*[29] supports his proposition. In *Caswell's* case[30] the headnote accurately states the law as to the responsibility for breach of statutory duty. Lord Wright at the end of his opinion[31] was confining himself to contributory negligence. In *Flower's* case[32] Lord Wright was more concerned to consider how far contributory negligence was an answer to a breach of statutory duty.

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[23] [1951] A.C. 367; [1951] 1 T.L.R. 25; [1951] 1 All E.R. 42.

[24] [1940] A.C. 152.

The cases cited by the appellant were only on the fringe of the matter. This is a plain case of a negligent act by the crane driver.

David Turner-Samuels following. The question is raised whether *Caswell's* case[33] can be used by an employer as a shield in an action by a workman injured by a fellow servant. In the case of such a claim the court must consider two separate questions: (1) whether the person employed by the defendant in respect of whose alleged negligence the claim is brought was guilty of negligence, and (2) if so, whether the plaintiff was himself guilty of contributory negligence. In considering the degree of care to be exercised in the case of negligence three factors are to be considered, (1) the degree of risk of injury, (2) the magnitude of the damage which may result, and (3) the magnitude of the measures necessary to eliminate the risk balanced against the other two factors: see *Paris* v. *Stepney Borough Council*[34] and (as to the third factor) *Latimer* v. *A.E.C. Ltd.*[35] The test in the case of contributory negligence is different and a different degree of care is involved: see *Lewis* v. *Denye*[36] and *Caswell's* case.[37] An illustration of the fact that a workman is not held guilty of contributory negligence for every slip is found in *General Cleaning Contractors Ltd.* v. *Christmas.*[38]

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[25] (1850) 5 Ex. 343.

[26] (1858) 3 Macq.H.L. 266, 282–283.

[27] [1938] A.C. 57, 70.

[28] [1955] 1 Q.B. 474, 480.

[29] [1952] 2 Q.B. 852.

[30] [1940] A.C. 152.

[31] Ibid. 179–180.

[32] [1936] A.C. 206, 214, 216.

[33] [1940] A.C. 152.

Marven Everett Q.C. in reply. This case is simple and but for what was said in the Court of Appeal would not have come to the House of Lords. It is not sound to say that the same act or omission by the same person on the same occasion may be negligence for one purpose but not for another.

In every case one must consider the facts and see whether there was negligence. *Flower's* case[39] and *Caswell's* case[40] do not lay down any general principle. They only say that if certain conditions are present one must not judge the workman too harshly. What is said is not limited to cases of industrial injuries. Each case must be approached in the light of its own circumstances. [Reference was also made to Notes on Causation and Responsibility in English Law, by Lord Wright, Cambridge Law Journal, 1955, pp. 163, 166; *Grant* v. *Sun Shipping Co. Ltd.*[41]; *Hutchinson* v. *London and North Eastern Railway Co.*[42]; *Lewis* v. *Denye*[43]; *Caswell's* case[44] and *Flower's* case.[45]]

Their Lordships took time for consideration.

Jan. 31, 1956. LORD MORTON OF HENRYTON. My Lords, the respondent was injured in an accident which occurred in the appellant company's works at Hollingwood in the county of Derby. A pan laden with heavy cores, which was being lifted by an overhead travelling crane, swung outwards and the respondent's arm was trapped between the pan and a railway wagon. Both the respondent and the crane driver were employed by the appellant company.

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[34] [1951] A.C. 367, 380–381, 385.

[35] [1953] A.C. 643.

[36] [1939] 1 K.B. 540, 554–555; 55 T.L.R. 391; [1939] 1 All E.R. 310; (H.L.) [1940] A.C. 921; 56 T.L.R. 900; [1940] 3 All E.R. 299.

[37] [1940] A.C. 152.

[38] [1953] A.C. 180, 194; [1952] 2 All E.R. 1110.

[39] [1936] A.C. 206.

[40] [1940] A.C. 152.

[41] [1948] A.C. 549, 554–555; [1948] 2 All E.R. 238.

[42] [1942] 1 K.B. 481; 58 T.L.R. 174; [1942] 1 All E.R. 330.

[43] [1940] A.C. 921, 931.

[44] [1940] A.C. 152, 164, 168, 178, 179, 186, 188.

[45] [1936] A.C. 206, 209, 211–212, 214.

The appeal raises two questions of fact: (1) Was the crane driver negligent? (2) If so, was the respondent guilty of contributory negligence?

I have had the advantage of reading in print the speech prepared by my noble and learned friend, Lord Tucker, which deals fully with these questions of fact and also with questions as to the standard of care to be applied in the circumstances of the present case. I entirely agree with this speech, but I think I ought to add a few words on two passages in the judgments below which were discussed very fully in the course of the argument.

Sellers J. began his judgment as follows: "This is a claim "in respect of an accident occurring in a factory or shop, and it "is one of a character which is common in the courts now but "which could not have been maintained successfully prior to the "Act which removed the defence to employers of common "employment" i.e. the Law Reform (Personal Injuries) Act, 1948. "It is a type of action which seems to be increasingly "entertained in the courts at the present time. To my mind "it does give rise to a serious question as to whether these acts "of carelessness, or inadvertence, which arise in factories in the "course of work where people are collaborating together and "working in a team should be described, except in exceptional "circumstances where the conduct is so excessively bad as to "require the description, as acts of negligence or errors of "judgment."

My Lords, this passage is open to the interpretation that, in deciding the question "negligence or no negligence," the court should apply an especially lenient standard of conduct in a case where workmen are collaborating together and working in a team. If the passage does bear that meaning, I cannot agree with it, and no authority was cited to the House which supports it. The crane driver was bound, in accordance with well-established principles, to use that degree of care which an ordinary, prudent crane driver would have used in the circumstances. As to the case of the injured respondent who was charged with contributory negligence, I desire to add nothing to the observations of my noble and learned friend Lord Tucker.

A second passage with which I cannot wholly agree occurs in the judgment of Denning L.J. In dealing with the question whether the crane driver was negligent the learned Lord Justice said[1]: "He" (i.e. the employer) "acts by his servant; and

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[1] [1955] 1 Q.B. 474, 480; [1955] 1 All E.R. 6.

"his servant's acts are, for this purpose, to be considered as his "acts. Qui facit per alium facit per se. He cannot escape "by the plea that his servant was thoughtless or inadvertent or "made an error of judgment. If he takes the benefit of a "machine like this, he must accept the burden of seeing that "it is properly handled." The learned Lord Justice then proceeded: "It is for this reason that the employer's responsibility "for injury may be ranked greater than that of the servant who "actually made the mistake: see *Jones* v. *Manchester Corporation*,[2] and he remains responsible even though the servant "may, for some reason, be immune: see *Broom* v. *Morgan*.[3] "A good illustration, as Mr. Beney pointed out, is *Stapley* v. "*Gypsum Mines Ltd.*,[4] where the widow of the dead man, "Stapley, succeeded against his employer, though she would, no "doubt, have failed against his fellow-workman Dale because "of their joint agreement."

My Lords, what the court has to decide in the present case is: Was the crane driver negligent? If the answer is "Yes," the employer is liable vicariously for the negligence of his servant. If the answer is "No," the employer is surely under no liability at all. Cases such as this, where an employer's liability is vicarious, are wholly distinct from cases where an employer is under a personal liability to carry out a duty imposed upon him as an employer by common law or statute. In the latter type of case the employer cannot discharge himself by saying: "I "delegated the carrying out of this duty to a servant, and he "failed to carry it out by a mistake or error of judgment not "amounting to negligence." To such a case one may well apply the words of Denning L.J.: "[The employer] remains responsible even though the servant may, for some reason, be "immune." These words, however, are, in my view, incorrect as applied to a case where the liability of the employer is not personal but vicarious. In such a case if the servant is "immune," so is the employer. See, for instance, *Esso Petroleum Co. Ltd.* v. *Southport Corporation*.[5] This passage in the judgment of Denning L.J. receives no support in the judgments of Hodson and Romer L.JJ., and I cannot find that the decisions in the cases cited by Denning L.J. lend any support to it, though it may be that the passage is to some extent supported by certain dicta in the first two of these cases.

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[2] [1952] 2 Q.B. 852; [1952] 1 T.L.R. 1589; [1952] 2 All E.R. 125.

[3] [1953] 1 Q.B. 597; [1953] 1 All E.R. 849.

[4] [1953] A.C. 663; [1953] 2 All E.R. 478.

[5] Ante 218; [1955] 3 All E.R. 864.

Although I have felt bound to express my dissent from this passage in the judgment of Denning L.J. I am glad to find myself in agreement with the views expressed by him and by his colleagues that the crane driver was negligent, and that contributory negligence is not proved against the respondent.

I would dismiss the appeal.

Lord Porter. My Lords, I have had the opportunity of reading in print the opinion of my noble and learned friends, Lord Morton of Henryton and Lord Tucker, and find myself in agreement with the views expressed by them, and concur in the result.

Lord Reid stated the facts and continued: My Lords, it is proved that the proper practice is not to raise the load at once but only to take the weight on the chains and then to pause to see whether everything is in order. For some reason which she could not explain the crane driver did not do this, and, if she had done, the lack of centring ought to have been noticed and the accident would almost certainly have been avoided. The question is whether her failure to pause in lifting the load was negligence for which the appellants, her employers, are responsible.

Sellers J. held that both Jones and the crane driver were guilty of errors of judgment but not of negligence, but, at least as regards the crane driver, I do not think that he applied the right test of negligence. As regards Jones, I do not find it necessary to decide whether he applied the right test of contributory negligence because, as I have already said, the evidence is too indefinite to warrant a finding of contributory negligence on any test. His reasons appear from the following passages in his judgment:

"It is a type of action which seems to be increasingly entertained in the courts at the present time. To my mind it does "give rise to a serious question as to whether these acts of "carelessness, or inadvertence, which arise in factories in the "course of work where people are collaborating together and "working in a team should be described, except in exceptional "circumstances where the conduct is so excessively bad as to

" require the description, as acts of negligence or errors of judg-" ment. The question is not without considerable importance " because, as I have said, these accidents are very common. . . .

" I think there was some fault on the crane driver's part, but " I think there was at least as great, and probably greater, fault " on the part of the plaintiff himself and, as I say, it raises " quite acutely the question whether the court here ought to " characterize this failure to do that which ought to have been " done in the circumstances as acts of negligence—which would " mean that the plaintiff would recover some damages, but only " a proportion which is ultimately assessed to be his due having " regard to his own conduct—or whether in circumstances such " as this where there is team work, routine work, work which " necessitates a close co-operation with both and where there is " a mistake which results, but only just results, in an accident " as here, whether it is not more appropriate to regard them in " such a case as this as errors of judgment on the part of both.

" I recognize that errors of judgment which might have been " so described at any rate a hundred years ago perhaps have " tended to be described in more recent years as acts of negli-" gence, but when the question arose as to the conduct of " operatives in a factory some years ago as to whether their " inadvertent careless acts ought to be characterized as contribu-" tory negligence, the court took the view, and the House of " Lords, the higher court, took the view, that it was not every " act of inadvertence and carelessness which might arise in the " course of a day's work where operatives were subject to noise, " fatigue and diversions of one sort and another which ought to " be contributory negligence. I should not describe the acts of " either the plaintiff himself or the crane driver in the circum-" stances of this case as acts of negligence but of errors of " judgment. . . .

" I think it was one of those accidents which occur and are " bound to occur in the rough and tumble of industry and can " quite properly be described as an error of judgment."

This seems to me to be based on the view that conduct which would amount to negligence if a stranger were injured may not amount to negligence if the person injured is a fellow servant. If that was the view of the learned judge I cannot agree with it. One can imagine a case where the conduct of a servant has caused injury both to a fellow servant and to a passer-by in the street. If that conduct is negligence vis-à-vis the stranger I cannot see how it could be other than negligence vis-à-vis the fellow servant; if the servant is liable to the one he is equally liable to the other (apart from any question of contributory negligence); and if the servant is liable so is the master. Moreover, the abolition of the doctrine of common employment appears to me to make it necessary to hold that the test of negligence is the same whether the person injured is a fellow servant or a stranger: to hold otherwise would mean that if a servant causes damage then by reason of their common employment a fellow servant would not have as full a remedy against his master as a stranger would have.

It was argued that this view of the law would lead to grave anomalies and, indeed, is not consistent with *Caswell* v. *Powell Duffryn Associated Collieries Ltd.*[6] That case decided, at least with regard to cases of breach of statutory duty—I express no opinion whether it goes farther—that what I may call excusable lapses do not amount to contributory negligence. It was suggested that two fellow servants might be injured by such lapses on the part of both of them: then, unless Sellers J. is right, each could sue the employer founding on the negligence of the other but neither could be held guilty of contributory negligence, and it was argued that this could not be right. It may be that some such result is inevitable—again I express no opinion until the case arises—but that would not be a reason, in my view, for trying to make *Caswell's* case [6] apply to negligence as well as to contributory negligence. In that case this House was only dealing with contributory negligence and most of the reasoning is quite inapplicable to anything else. It may be that a servant can say to his employer, "You cannot complain of my "lapse because you put me in a situation where a careful and "prudent man might well have a lapse like mine" but neither he nor his employer can say that to a fellow servant. All either of them could say would be: "You cannot complain because "when you took on the work you must have known that lapses "of this kind were bound to happen"; in other words, scienti non fit injuria. But that would just be reviving the doctrine of common employment which Parliament has abolished.

The Court of Appeal reversed the decision of Sellers J., but different views were expressed on the law. Denning L.J., as I read his judgment, did not find it necessary to hold that the crane driver was herself negligent. He said [7]: "The employer "is made liable, not so much for the crane driver's fault, but

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[6] [1940] A.C. 152; 55 T.L.R. 1004; [1939] 3 All E.R. 722.

[7] [1955] 1 Q.B. 474, 480.

"rather for his own fault committed through her. . . . He acts "by his servant; and his servant's acts are, for this purpose, "to be considered as his acts. Qui facit per alium facit per se. "He cannot escape by the plea that his servant was thoughtless "or inadvertent or made an error of judgment. If he takes the "benefit of a machine like this, he must accept the burden of "seeing that it is properly handled. It is for this reason that "the employer's responsibility for injury may be ranked greater "than that of the servant who actually made the mistake."

My Lords, if this means that the appellants could be held liable even if it were held that the crane driver was not herself guilty of negligence, then I cannot accept that view. Of course, an employer may be himself in fault by engaging an incompetent servant or not having a proper system of work or in some other way. But there is nothing of that kind in this case. Denning L.J. appears to base his reasoning on a literal application of the maxim qui facit per alium facit per se, but, in my view, it is rarely profitable and often misleading to use Latin maxims in that way. It is a rule of law that an employer, though guilty of no fault himself, is liable for damage done by the fault or negligence of his servant acting in the course of his employment. The maxims respondeat superior and qui facit per alium facit per se are often used, but I do not think that they add anything or that they lead to any different results. The former merely states the rule baldly in two words, and the latter merely gives a fictional explanation of it. "It has long been the established "law of this country that a master is liable to third persons for "any injury or damage done through the negligence or unskilful"ness of a servant acting in his master's employ. The reason "of this is, that every act which is done by a servant in the "course of his duty is regarded as done by his master's orders, "and consequently is the same as if it were the master's own "act, according to the maxim, qui facit per alium facit per se" (*per* Lord Chelmsford L.C. in *Bartonshill Coal Co.* v. *McGuire*[8]). On the same occasion Lord Cranworth used the two maxims apparently without thinking that there was any difference between them (*Bartonshill Coal Co.* v. *Reid*[9]) and later authorities do not appear to me to establish any material difference. I do not think that the foregoing passage from Lord Chelmsford's speech will support an employer being held liable for something which was not negligent or wrongful on the part of his servant.

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[8] (1858) 3 Macq. 300, 306.

[9] (1858) 3 Macq. 266, 283.

Denning L.J. refers to three cases in support of his view. *Jones* v. *Manchester Corporation*[10] was a complicated case in which there were considerable differences of opinion. Two doctors were negligent: they were employed by a hospital board and the question was who should pay the damages. I find nothing in the decision relevant to the present question, but there are statements that master and servant are joint tortfeasors. They may be treated as such, but that does not seem to me to lead to the conclusion that the master may be held liable for some act of the servant which was not negligent or wrongful on his part. In *Broom* v. *Morgan*[11] a husband and wife were fellow servants, and the wife was injured by the negligence of the husband. She recovered damages from her employer although she could not sue her husband. But, although the husband could not be sued, his injuring his wife was a wrongful act on his part, and again this case is to my mind no authority for a master being liable for an act which it was not wrongful for a servant to do. In *Stapley* v. *Gypsum Mines Ltd.*[12] two miners were in breach of a statutory regulation and one was killed and it was held that the fault of the other was a contributory cause of the accident. They had agreed together to break the regulation, but the employer did not and probably could not plead volenti non fit injuria. Whether an action by the widow against the fellow servant would have succeeded or have been defeated by such a plea or in some other way I do not know, but the fellow servant was certainly at fault; and this case again is no authority for the master being liable when his servant was not guilty of fault.

Hodson and Romer L.JJ. do not follow Denning L.J. on this point and they appear to me to base their judgments on the crane driver having been negligent. I think she was negligent. The system was that there were two safety checks. Jones was supposed to see to the first, centring, and the crane driver was responsible for the second, pausing after taking the weight of the load. The first was not done but, as I have said, there is insufficient evidence to find that Jones was guilty of contributory negligence. But the fact that the first check was omitted is no excuse for failure to carry out the second, and the crane driver gave no reason to explain her failure. I am therefore of opinion that this appeal should be dismissed.

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[10] [1952] 2 Q.B. 852.

[11] [1953] 1 Q.B. 597.

[12] [1953] A.C. 663.

LORD TUCKER stated the facts and continued: My Lords, facts such as these are of common occurrence and are being investigated by the courts every day, and it may be thought surprising that they should be capable of raising questions of law worthy of consideration in your Lordships' House, but the trial judge and Denning L.J. appear to have thought that the Law Reform (Contributory Negligence) Act, 1945, and the Law Reform (Personal Injuries) Act, 1948, whereby the consequences of a finding of contributory negligence were mitigated and the defence of common employment abolished, taken in conjunction with certain observations in this House in the case of *Caswell* v. *Powell Duffryn Associated Collieries Ltd.*,[13] have resulted in some fundamental alteration in the law of negligence and contributory negligence or have at least necessitated a reappraisement of the standard of care imposed upon master and servant respectively with regard to the acts of the latter in the course of his employment.

My Lords, I do not share this view, but having regard to the course this case has taken it will be necessary later to make some reference to these matters.

Returning to the facts of this case, I am of opinion that negligence on the part of the crane driver for which the appellant company is responsible to the respondent was clearly established on the evidence of their own witnesses, namely, the crane driver and the appellants' works manager, Mr. Howard. [His Lordship stated the relevant evidence and continued:] Sellers J., the trial judge, took the view that the conduct of the crane driver fell short of negligence and amounted to no more than an error of judgment not rendering the appellants liable in damages. At the outset of his judgment he referred to the increasing number of actions of this kind which, since the abolition of the defence of common employment, came before the courts, and went on to say: "To "my mind it does give rise to a serious question as to whether "these acts of carelessness, or inadvertence, which arise in "factories in the course of work where people are collaborating "together and working in a team should be described, except in "exceptional circumstances where the conduct is so excessively "bad as to require the description, as acts of negligence or errors "of judgment." The learned judge took the same view with regard to the acts or omissions of the respondent—as to which more hereafter—with the result that he entered judgment for the appellants.

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[13] [1940] A.C. 152.

On appeal his judgment was reversed. All three Lords Justices (Denning, Hodson and Romer L.JJ.) agreed that the respondent should not be held to have been guilty of contributory negligence but that the appellants were responsible for the acts or omissions of the crane driver, Hodson and Romer L.JJ. on the ground that the crane driver had been guilty of negligence in the course of her employment for which her employer was liable, and Denning L.J.[14] on the ground "that the employer's responsibility ". . . may be ranked greater than that of the servant who actually "made the mistake . . . and he remains responsible even though "the servant may, for some reason, be immune." The Court of Appeal accordingly entered judgment for the respondent for a sum of damages which was subsequently agreed at £333 16s. 2d.

My Lords, I agree so completely with the judgments of Hodson and Romer L.JJ. on the issue as to the negligence of the crane driver and the appellants' responsibility therefor that I am content to repeat and adopt one paragraph from the judgment of the former in which, after referring to the trial judge's view that she was guilty of no more than an error of judgment, he said[15]: "I am of opinion that this fault ought not to be "so regarded. A departure from the normal safe practice of "taking the strain when raising heavy loads by crane in a sling "is obviously dangerous when anyone is near the load. In my "view, in the circumstances of this case, the failure of the crane "driver to take the precaution was an act of negligence which "caused the injury to the plaintiff, and for this the employer is "as liable as if he himself had been sitting in the crane cabin "and working the crane. I cannot agree that the act or omission "of the employers' servant ought, as the trial judge thought, to "be looked at exactly in the same way as the act or omission of "the plaintiff."

I do not, however, agree that this result is in any way dependent, as the Lord Justice seems to have thought, on such cases as *Smith* v. *Charles Baker & Sons*,[16] or *Wilsons and Clyde Coal Co. Ltd.* v. *English*.[17] Those were both cases dealing with what is sometimes called "personal negligence," where the employer cannot escape responsibility for some duty imposed upon him personally by delegating the performance thereof to a competent agent or independent contractor. The present is a simple straightforward case of a master's responsibility for the acts of his servant done in the course of her employment.

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[14] [1955] 1 Q.B. 474, 480.

[15] Ibid. 482.

[16] [1891] A.C. 325; 7 T.L.R. 679.

[17] [1938] A.C. 57; 53 T.L.R. 944; [1937] 3 All E.R. 628.

I turn now to the issue of contributory negligence. It was alleged as follows in the defence: [His Lordship read the relevant pleadings and continued:] The case made against the respondent is really contained in (*b*), and it was on this ground that the trial judge and Denning L.J. found him at fault, albeit without any harmful legal consequences to himself, basing themselves, in the case of Denning L.J.—and I think also in the case of Sellers J., although he does not expressly refer thereto—on what has been called the doctrine of *Flower* v. *Ebbw Vale Steel, Iron and Coal Co. Ltd.*,[18] as approved in *Caswell* v. *Powell Duffryn Associated Collieries Ltd.*,[19] viz., that " it is not for every risky thing which " a workman in a factory may do in his familiarity with the " machinery that a plaintiff ought to be held guilty of contributory " negligence."

My Lords, let me say at once that, while accepting without question this and other dicta to a similar effect which have been used in this House in relation to cases under the Factories Acts and other statutes imposing absolute obligations on employers or occupiers of premises, I doubt very much whether they were ever intended or could properly be applied to a simple case of common law negligence such as the present where there was no evidence of work-people performing repetitive work under strain or for long hours at dangerous machines. However this may be, I am of opinion that the decision reached by all four judges below, to the effect that the respondent has not precluded himself from recovering damages in full from the appellants, can be fully justified without resort to the so-called doctrine of *Caswell's* case.[20] My reasons for so holding are as follows: I think the true effect of the evidence as a whole with regard to the respondent's duty in this combined operation was correctly described by Hodson L.J. when he said: " It was his duty to assist the crane driver to drop " the sling as nearly as possible in the centre of the pan, but " being at the side himself his centring could only be approxi- " mate." It was for this reason that it was so important for the crane driver to take the weight before lifting. No questions were put to the respondent suggesting what he did wrong or failed to do which resulted in the crab not being central. It was never suggested that he ought to have stood some distance back between the rail lines so as to get a better view of the exact position of the crab. In the position in which he was at the side of the pan with the pile of cores between him and Groves, a position which was never suggested as being an improper one, it was, I think, obvious that he could not be expected to " ensure " that the crab was centrally placed; and the evidence was insufficient to justify a finding that his conduct at any stage fell below the standard required from a reasonably careful workman assisting in such an operation.

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[18] [1934] 2 K.B. 132, 140.

[19] [1940] A.C. 152, 166.

[20] [1940] A.C. 152.

My Lords, I think I have already sufficiently indicated that I do not consider that recent legislation has in any way altered the standard of care which is required from workmen or employers or that the standard can differ according to whether the workman is being sued personally or his employer is being sued in respect of his acts or omissions in the course of his employment. It is true that, in accordance with what was said in this House in *Caswell's* case,[20] there may be cases, such as those involving breach of statutory duty, where an employer who is in breach of his duty cannot be heard as against his own servant who has been injured thereby to say that some risky act due to familiarity with the work or some inattention resulting from noise or strain amounts to contributory negligence. In this respect it is possible the same act may have different consequences when the injured man is the plaintiff suing his employers and where the employer is being sued by a third party (including another employee) in respect of the same act or omission. This is not so illogical as may appear at first sight when it is remembered that contributory negligence is not founded on breach of duty (cf. *Nance* v. *British Columbia Electric Railway Co. Ltd.*[21] and *Lewis* v. *Denye*[22] and the cases there referred to), although it generally involves a breach of duty, and that in Factory Act cases the purpose of imposing the absolute obligation is to protect the workmen against those very acts of inattention which are sometimes relied upon as constituting contributory negligence so that too strict a standard would defeat the object of the statute.

This doctrine cannot be used so as to require any modification in the standard of care required from a workman in relation to his fellow servants or other third parties or the resulting liability of his employers.

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[21] [1951] A.C. 601; [1951] 2 T.L.R. 137; [1951] 2 All E.R. 448.

[22] [1939] 1 K.B. 540, 544; 55 T.L.R. 391; [1939] 1 All E.R. 310.

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Since writing the above I have read in print the speech which has just been delivered by my noble and learned friend, Lord Morton of Henryton, and I desire to add that I concur in it.

I would dismiss the appeal.

LORD COHEN. My Lords, I have had the opportunity of reading in print the speech delivered by the noble and learned lord, Lord Tucker, and agree with him that the appeal should be dismissed, for the reasons he gives.

Appeal dismissed.

Solicitors: *Bell, Brodrick & Gray for Harold Jackson & Co., Sheffield; W. H. Thompson.*

F. C.

[HOUSE OF LORDS.]

H. L. (Sc.)*

1956

Jan. 26, 30; *Mar.* 8.

GRANT . . . . APPELLANT;

AND

NATIONAL COAL BOARD . . . . . RESPONDENTS.

Mines—Coal—Breach of statutory duty—Roof and sides—Fall of roof —Travelling road obstructed—Bogie derailed—Injury to mineworker—Liability of mineowners—Coal Mines Act, 1911 (1 *&* 2 *Geo.* 5, *c.* 50), *s.* 49.

By section 49 of the Coal Mines Act, 1911: "The roof and sides "of every travelling road . . . shall be made secure. . . ."

A mineworker was injured by the derailment of a bogie in which he was riding when it struck some stone which had fallen from the roof of the travelling road:—

Held, that his injury was caused by a breach of section 49 on the part of the mineowners, and that the accident was one against which the legislation was designed to protect him.

Gorris v. *Scott* (1874) L.R. 9 Ex. 125 distinguished.

Decision of the Second Division of the Court of Session, 1955 S.L.T. 287 reversed.

APPEAL from the Second Division of the Court of Session.

The appellant, George Grant, raised an action of damages in the Sheriff Court at Dunfermline against the respondents, the

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* *Present*: VISCOUNT SIMONDS, LORD REID, LORD TUCKER, LORD KEITH OF AVONHOLM and LORD SOMERVELL OF HARROW.

National Coal Board, by whom he was employed as a mineworker at their Minto Colliery, Lochgelly, Fife.

In condescendence II the appellant averred: "On the night "of May 31/June 1, 1953, the [appellant] was working in the "said Minto Colliery. . . . The [appellant], in company with "another man, was extending a conveyor belt in the underground "workings. . . . On completing his work the [appellant] at, or "about, 6 a.m. on June 1, 1953, proceeded to make his way out "of the said underground workings." This the respondents admitted.

In condescendence III the appellant averred: "In order to "reach the surface, the [appellant] required to travel in the "man-haulage in the Bogie Dook in said colliery. The [appel-"lant] along with another man, William Wilson, sat in one of "the empty man-haulage bogies, which then started to travel up "the said Dook. After travelling some distance up the Dook, "the bogie in which the [appellant] was sitting ran over some "redd or stone which had fallen from the roof of the said Dook "and the bogie was derailed. . . . The [appellant] was flung "out of the bogie . . . sustaining . . . injuries. . . ." This also the respondents admitted.

In condescendence IV the appellant averred: "The said acci-"dent was due to the breach by the [respondents] of section 49 "of the Coal Mines Act, 1911. The said section 49 provides, "inter alia: 'The roof and sides of every travelling road . . . "'shall be made secure . . .' The said Bogie Dook is a travelling "road and the said section 49 applies thereto. It is the duty "of the [respondents] to comply with the provisions of section 49 "and to see that the roof of the said Bogie Dook was secure and "was kept secure." He then averred the way in which the respondents had failed to keep the roof secure "so as to prevent "the fall of redd from the centre of the roof to the rails. Had "the [respondents] complied with the provisions of the said "section 49 and made and kept the said roof secure, the acci-"dent to the [appellant] would not have happened." Beyond referring to the terms of section 49, the respondents denied these averments.

Neither party moved for a proof, except as regarded the amount of damages. The respondents pleaded that the appellant's averments were irrelevant and insufficient in law to support the crave and that the sum sued for was excessive. The appellant pleaded that the defences were irrelevant, except as regarded the quantum of damages. The Sheriff-Substitute sustained this plea for the appellant but the Second Division recalled the Sheriff-Substitute's interlocutor and dismissed the action.

Hector M'Kechnie Q.C. and *R. H. M'Donald* (both of the Scottish Bar) for the appellant. On the admitted facts the injuries of the appellant were caused by the respondents' breach of their statutory duty under section 49 of the Coal Mines Act, 1911, which imposes on them an absolute obligation to make the roof of every travelling road and working place secure. It is this absolute duty which is relied on; no negligence is alleged.

For the general principle applicable to such cases as this, see *Butler (or Black)* v. *Fife Coal Co. Ltd.*[1] The duty under section 49, if it applies, is as high as that discussed in *Edwards* v. *National Coal Board.*[2] There is no reason to limit the danger aimed at by the section to direct hits by falling stone; its object is not confined to the protection of men against such injury; it was also intended to protect them against injury by stone after it had fallen. Thus, although direct hits may be the primary danger, another danger no less to be prevented is a fall blocking the egress of the men and cutting them off. So also the section is meant to guard against the danger of a man tripping over fallen stone, or a fallen stone might rebound and hit a man. A man using a travelling road, as distinct from a working place, would be less likely to be injured by a direct hit than by the presence of fallen stone. There is no difference in law, in logic or in principle between dropping an object and hitting a man and dropping it and letting it lie so as to trip him, between a direct hit and derailment attributable to a previous fall of roof. Section 49 itself contains no limitation. In the Building Regulations, 1948 (S.I. 1948, No. 1145), regulation 90 provides for "protection from falling "material," not "fallen." If Parliament had meant to give a limited protection, it would have said "falling" in section 49, but instead it indicated a general intention to protect miners, when travelling, from the consequences of falls from the roof. This is not like such cases as *Nicholls* v. *F. Austin (Leyton) Ltd.*,[3] *Carroll* v. *Andrew Barclay & Sons Ltd.*[4] and *Gorris* v. *Scott*,[5] where something in the Act in question justified a restriction, whereas there is no such justification here. The quotation from

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[1] [1912] A.C. 149, 178–179; 28 T.L.R. 150.

[2] [1949] 1 K.B. 704, 710; 65 T.L.R. 430; [1949] 1 All E.R. 743.

[3] [1946] A.C. 493; 62 T.L.R. 320; [1946] 2 All E.R. 92.

[4] [1948] A.C. 477; 64 T.L.R. 384; [1948] 2 All E.R. 386.

[5] (1874) L.R. 9 Ex. 125.

Winfield on the Law of Tort in *Smithwick* v. *National Coal Board* [6] is accurate but inapplicable here.

Since there is no inherent limitation in section 49, it is not right to import a limitation by reference to sections which were new in the Act of 1911. No such limitation can be deduced from sections 44 (1), (3) (*a*), (4), 45 (2) and 48 reproducing provisions in its predecessor. If this question had arisen before 1911 the appellant's proposition could not have been controverted. The section should be given the meaning originally given to it by Parliament. Section 50 helps the appellant.

One must find out what the enactment is intended to remedy and, if the words used are general, the person arguing for a limitation on them has the onus of establishing it.

If a house is allowed to become ruinous and falls into the street and a person runs into it, his running into it is within the chain of causation of the falling. So, too, if a man dug a hole in the street and someone fell into it, he could not say that the cause of the fall was not his digging of the hole but his not having filled it in. Yet the respondents are saying that the cause of this accident was not the fall of the stone but the fact that it was not removed.

[*Wraith* v. *National Coal Board* [7]; *Lochgelly Iron and Coal Co. Ltd.* v. *M'Mullan* [8]; *Amalgamated Denaby Collieries Ltd.* v. *Christen*,[9] and *Caulfield* v. *P. W. Pickup Ltd.*[10] were also referred to.]

J. O. M. Hunter Q.C. (of the English Bar, Q.C. of the Scottish Bar) and *A. J. Mackenzie Stuart* (of the Scottish Bar) for the respondents. The parties are not at issue on the legal principles involved but on whether they are applicable here. They may be found in *Smithwick* v. *National Coal Board* [11] and *Gorris* v. *Scott*,[12] from which it appears that it is not sufficient to show that there was a breach of a statute and that the breach caused the accident. If the accident happened in a way not contemplated by the Act, one cannot imply an intention in the legislature that there should be civil liability. See also *Nicholls* v. *F. Austin (Leyton) Ltd.*[13] and *Carroll* v. *Andrew Barclay & Sons Ltd.*[14]

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[6] [1950] 2 K.B. 335, 342; 66 T.L.R. (Pt. 2) 173.

[7] [1954] 1 W.L.R. 264; [1954] 1 All E.R. 231.

[8] [1934] A.C. 1, 8; 49 T.L.R. 566.

[9] [1939] 2 All E.R. 395.

[10] [1941] 2 All E.R. 510.

[11] [1950] 2 K.B. 335, 342.

[12] L.R. 9 Ex. 125, 129, 130.

[13] [1946] A.C. 493, 506.

[14] [1948] A.C. 477.

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Here the only kind of injury for which the mineowner bears civil liability under section 49 is injury caused by the direct impact of material falling from the roof while it is actually falling.

In the first place, the appellant's case is inadequately pleaded, for when a person alleges a breach of section 49 he must allege that it was a breach quoad him, and that has not been done here. The delict under that section is putting a man to work under a dangerous roof which may fall and hit him, but here the appellant was not in the situation of danger against which the section was aimed. Further, it does not appear from the averments how long a time elapsed between the fall of the stone and the accident.

Sections 42 to 48 deal with the floors of travelling and haulage roads. In the present case the Dook was both a haulage and a travelling road. Section 49, dealing with the support of roof and sides, contains within itself an indication of the danger at which it was aimed, its object being to prevent men working or travelling under an insecure roof. This view is supported by the succeeding sections, such as sections 50 and 75 as amended by the Coal Mines (Support of Roof and Sides) General Regulations, 1947 (S.R. & O. 1947, No. 973). Section 49 stands apart from and is in contrast with the provisions of sections 42 to 48, in which provision is made for keeping the travelling roads free from obstruction. Section 43, dealing with travelling on haulage roads, enlarges the safety provisions of the Coal Mines Regulation Act, 1887. It would be remarkable for the legislature to have put into the Act of 1911 the new provision of section 47, dealing with the clearance of haulage roads of obstructions, if the contingency was already covered by section 49 and its equivalent provision in the old Act. The appellant's reading of section 49 is not justified either by its own words or by those of the other sections. The very manner in which he sustained his injuries is dealt with by another section. It is wrong to read a provision like section 49 as if it were all-embracing and covered every eventuality. To read it as imposing an absolute duty to keep all floors free from obstruction would impose an impossible task on mineowners, one which the courts would strive to avoid.

It is admitted that at the time of the fall the respondents were guilty of a breach of statutory duty because the roof and sides were not secure, but it is not enough to prove such a breach; one must also prove a causal relationship between the breach and the injury.

The reasoning in the judgments in the Second Division was correct.

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Hector McKechnie Q.C. in reply. In *Gorris* v. *Scott* [15] there was a difference in kind between the two dangers there in question, but in the present case there is only a difference of degree. That case was very far from the present. *Nicholls* v. *F. Austin (Leyton) Ltd.*[16] and *Carroll* v. *Andrew Barclay & Sons Ltd.*[17] were decided on the actual wording of the sections in question.

A travelling road is quite different from a working place so far as the danger of being hit by a fall is concerned. In the respective sections Parliament was considering the danger appropriate to each case. All argument based on sections 50 and 52 is beside the point because they are dealing with working places. It is doubtful whether such a case as this would have come under section 47 but, in any event, there is no reason why two different sections should not deal with the same set of circumstances. See also the Coal Mines General Regulations (Precautions against Coal Dust), 1939 (S.R. & O. 1939, No. 1803), reg. 1.

Their Lordships took time for consideration.

March 8. VISCOUNT SIMONDS. My Lords, this appeal from an interlocutor of the Second Division of the Court of Session, which recalled an interlocutor of the Sheriff-Substitute of Fife and Kinross, raises a question of some importance which has not, I think, previously come before the court.

The appellant is a mineworker in the employment of the respondents at their Minto Colliery, Lochgelly, Fife, and in this action claims damages for injuries received by him in an accident which occurred in the course of his employment in the early morning of June 1, 1953.

The admitted facts are that the appellant with another man was extending a conveyor belt in the underground workings of the colliery, and on completing his work at about 6 o'clock a.m. proceeded to make his way out of the workings; that in order to reach the surface he required to travel in the man-haulage in the Bogie Dook in the colliery, and that along with another man he sat in one of the empty man-haulage bogies and that the bogie started to travel up the Dook, and after travelling some distance up the Dook the bogie in which he was sitting ran over some redd or stone which had fallen from the roof of the Dook and the bogie was derailed and the appellant was flung out of it and sustained injury. Nothing else was proved or admitted. It is a matter of conjecture when the redd or stone fell, what was its bulk, and whether it had been shifted since its fall. The appellant is content to rest his case on the undoubted fact that there was at some time such a fall and therefore at some time the roof of the Dook was not secure. He relies, therefore, on section 49 of the Coal Mines Act, 1911, claiming that the respondents have been guilty of a breach of their statutory duty and that he has suffered damage by that breach.

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[15] L.R. 9 Ex. 125.

[16] [1946] A.C. 493.

[17] [1948] A.C. 477.

Section 49 is in these terms: "The roof and sides of every "travelling road and working place shall be made secure, and a "person shall not, unless appointed for the purpose of exploring "or repairing, travel on or work in any travelling road or working "place which is not so made secure." It will be noticed that this is an absolute obligation: it is not qualified, as a statutory obligation sometimes is, by such words as "so far as possible." It is, moreover, a provision which has long found a place in legislation relating to mines, and naturally so; for the danger to mineworkers of a fall from roof or sides has long been known and anxiously guarded against.

The appellant's case, then, is simple enough: a breach, a fall of stone, ensuing injury.

My Lords, where damages are claimed for breach of a statutory duty without any allegation of negligence, the pursuer must establish two things: first, that the breach is intended, not only to be visited by a penalty but also to be the ground of civil liability to a class of persons of whom the pursuer is one, and, secondly, that the injury was one against which the legislation was designed to protect him. The first of these tests is undoubtedly satisfied in this case. No one questions that a civil action for damages can be founded on a breach of section 49. It is at the second test that, in my opinion, a real difficulty arises, in which I am not prepared to differ from your Lordships though I have been much pressed by the cogent arguments to be found in the judgments under appeal.

The principle here invoked is to be found in *Gorris* v. *Scott*.[1] It is accurately stated in the first paragraph of the headnote: "When a statute creates a duty with the object of preventing "a mischief of a particular kind, a person who, by reason of "another's neglect of the statutory duty, suffers a loss of a "different kind, is not entitled to maintain an action in respect "of such loss." The defendant in that case had neglected to comply with a certain Order made by the Privy Council under

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[1] (1874) L.R. 9 Ex. 125.

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the Contagious Diseases (Animals) Act, 1869. The Act was passed, as appeared from the preamble and elsewhere, in order to prevent the introduction and spread of contagious and infectious diseases amongst animals; the defendant ignored an Order containing provisions designed to this end, under which any ship bringing sheep or cattle from any foreign port to ports in Great Britain was required to have the place occupied by such animals divided into pens of certain dimensions and the floor of the pens furnished with battens or footholds. As Kelly C.B. pointed out,[2] the object of the Order was to prevent animals from being overcrowded and so brought into a condition in which the disease guarded against would be likely to be developed. As a result of the neglect of the Order the plaintiff suffered the loss of a number of sheep which were carried on the ship, not, however, because they contracted a contagious disease but because they were washed overboard; it was assumed that, had the Order been complied with, they would not have been washed overboard. As I have already said, the plaintiff was held to be not entitled to recover. "The Act of Parliament," said Pollock B.,[3] "was "passed alio intuitu. . . . Suppose, then, that the precautions "directed are useful and advantageous for preventing animals "from being washed overboard, yet they were never intended "for that purpose, and a loss of that kind caused by their neglect "cannot give a cause of action." In that case, as in the case under appeal, the plaintiff did not rely on negligence at common law but rested his case solely on a breach of statutory duty.

My Lords, the principle thus stated in *Gorris* v. *Scott*[4] more than 80 years ago has not, so far as I know, been questioned. The problem is whether it is applicable to this case. In *Gorris* v. *Scott*[4] it was, no doubt, easy to limit the scope of the enactment by reference to the preamble. In other cases, such as *Nicholls* v. *F. Austin (Leyton) Ltd.*,[5] somewhat different considerations arose. In that case the question was whether there had been an infringement of section 14 (1) of the Factories Act, 1937, which provides that: "Every dangerous part of any "machinery . . . shall be securely fenced." Upon the generality of the words, it was argued that the section imposed a duty to guard, not only against contact with dangerous machinery but also against dangerous materials being ejected from it. A different conclusion was reached by this House upon a consideration of the context of the section: it was held that the obligation to fence a dangerous machine was satisfied if the dangerous part was so screened as to prevent the body of the operator from coming into contact with it. The only assistance, I think, to be derived from this class of case is that they confirm that the measure of statutory obligation is to be ascertained from the context in which it is found.

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[2] L.R. 9 Ex. 128.
[3] Ibid. 131.
[4] L.R. 9 Ex. 125.
[5] [1946] A.C. 493; 62 T.L.R. 320; [1946] 2 All E.R. 92.

I turn again to section 49 of the Coal Mines Act. More narrowly, the question, as I see it, is whether it is to be ascertained from its words in their context that the object is to secure the safety of the miners generally or only to protect them from a particular danger, i.e., being crushed or hurt by a fall. It was, I think, conceded that this was the primary danger, but it was urged that a fall which cut off the workmen from their exit was a danger no less to be apprehended and no less to be prevented by keeping the roof secure. From that it is a short step to saying that the safety of the workman depends also on the roads being kept clear of debris from the roof or sides; for, if they are not, there must be a risk of derailment. The respondents relied on the fact that section 47 (a new section which was introduced into the mining code by the Act of 1911) dealt with the matter of obstruction of haulage roads and most strongly on the fact that section 49 itself dealt with the roof and sides, not only of travelling roads but also of working places. I have, as I have already said, been much pressed by the force of these arguments, but on the whole have come to the conclusion that they do not outweigh the considerations to which I have alluded.

If I do not deal more fully and explicitly with the judgments given in the Court of Session, I shall not, I hope, be thought to be wanting in respect to the learned judges who delivered them. I do not do so only because I have read and agree with the opinions which will be given by my noble and learned friends.

LORD REID. My Lords, the appellant raised this action of damages in the Sheriff Court at Dunfermline. He was employed by the respondents at Minto Colliery, and at about 6 a.m. on June 1, 1953, he was travelling from his work place at the end of his shift in a man-haulage bogie along a travelling road referred to as "the Dook." He avers: "After travelling some distance "up the Dook, the bogie in which the pursuer was sitting ran "over some redd or stone which had fallen from the roof of "the said Dook and the bogie was derailed," and he avers further that he was flung out of the bogie and suffered the injuries in respect of which he claims damages. The respondents in their defences expressly admit the averment which I have quoted, and also admit that the appellant was flung out of the bogie and sustained injuries.

Neither party moved for a proof, except as regards the amount of damages. The respondents plead that the appellant's averments are irrelevant, and the appellant pleads that the defences are irrelevant, except as regards quantum of damages. The Sheriff-Substitute sustained this plea for the appellant, but on appeal the Second Division recalled the Sheriff-Substitute's interlocutor and dismissed the action.

Before your Lordships, counsel for the respondents criticized the adequacy of the appellant's averments. It does not appear that any point was made with regard to this in the Sheriff Court or in the Court of Session, but as the point has been raised I must now deal with it. It is true that the averments are very brief, but, fairly read, I think that the critical averment means that at some time before the accident a substantial quantity of "redd or stone" had fallen from the roof to the place where it was when the bogie ran over it and was derailed. "Redd or "stone" appears to me to indicate something more substantial than a few small pieces which could easily be overlooked when the road was being inspected, and there is no suggestion in the defences that this material might have fallen somewhere else and then have been placed on the rails by some person. There was considerable argument about the time which might have elapsed between the fall and the accident. We do not know when the last inspection of the road took place before the accident, but, unless the respondents were in breach of their duty, the redd or stone cannot have been lying on the rails for very many hours before the accident. I am, therefore, prepared to take the case on the footing that the fall may have occurred at any time within a period of some hours before the accident.

Section 49 of the Coal Mines Act, 1911, provides: "The "roof and sides of every travelling road and working place shall "be made secure, and a person shall not, unless appointed for "the purpose of exploring or repairing, travel on or work in any "travelling road or working place which is not so made secure."

Counsel for the respondents admitted, for the purpose of this case, that the averments which have been admitted by the respondents show that the roof was not secure at the time when the fall occurred and that the respondents were then in breach of section 49.

The first question is whether this breach of section 49 caused the accident. If it did not, then the case is at an end. But, in my opinion, the respondents' admissions are sufficient to show that the appellant's injuries were caused by this breach. If the fall from the roof had occurred only a few moments before the accident I do not see how this could be disputed. The breach of section 49 certainly caused the fall from the roof, and in such a case I do not see what else than this fall could be said to have caused the accident. It is not said that the bogie was being driven negligently, nor is it suggested that the accident could be attributed to anything but the fall of the roof. The fall may, however, have occurred a considerable time before the accident. Does such a lapse of time make any difference as regards causation? It could, I think, only make a difference if it were reasonable to suppose that something may have happened during that time which could be said to have caused the accident or broken the chain of causation between the fall and the accident. No such occurrence has been, or, I think, could reasonably be, suggested. It may be that if some days had elapsed between the fall and the accident, then the accident could be attributed not to the fall, but to failure to remove the fallen material. But I do not think that that can reasonably be suggested in this case. Apart from other considerations, it would mean that the respondents had gravely neglected their duty to inspect the road and to remove obstructions.

The question whether an employer is liable to an employee for injuries caused to him by breach of a statutory duty depends on whether there can be implied from the terms of the statute imposing the duty an enactment that the employer shall be so liable. In general that is implied from the enactment of a duty in the interest of the safety of employees, and in this Act there is no room for doubt that civil liability must be implied because section 102 (8) gives a defence to an action for damages if the mineowner can show that it was not reasonably practicable to avoid or prevent the breach. That defence is not pleaded in this case.

But it is argued that it is not enough to show that there was a breach and that this breach caused the accident; if the accident happened in a way which the statute did not contemplate, then it is said that it cannot be implied that Parliament intended that there should be civil liability. In the present case it is argued that all that can be implied from section 49 is an enactment that the mineowner shall be liable for injury caused by material falling from the roof while it is actually falling because that is the only kind of injury which section 49 is intended to provide against.

As authority for this limitation of liability, the respondents found on *Gorris* v. *Scott.*[6] There the purpose of the enactment was to prevent the spread of contagious diseases among animals, and in a ship pens had to be erected to enable animals to be segregated. This was not done, and some sheep were washed overboard and lost: if there had been proper pens this would have been prevented. It was held that there was no liability for this loss because the enactment had nothing to do with safety: its sole purpose was to prevent the spread of disease. I do not doubt that this case was properly decided: if the enactment implied civil liability at all, then the appropriate implication was liability if a breach caused or contributed to a spread of disease. But it seems to me to be a very different thing to say that, where the object of the enactment is to promote safety, the implication is that liability only arises if the breach causes injury in a particular way.

There appears to be no reported case where such a limitation of liability for consequences of a breach of a safety provision has been adopted. In *Gatehouse* v. *John Summers & Sons Ltd.*[7] a man was pulling an electric cable to release it from a jam: it broke and he fell back and was killed. It was ultimately held that there was negligence at common law, but the question of liability in respect of a breach of statutory duty was raised and dealt with. One of the Electricity Regulations, 1908, made under the Factories Act provided that "every electric joint and "connexion shall be of proper construction as regards con- "ductivity, insulation, mechanical strength and protection" (regulation 6). The accident occurred owing to failure of mechanical strength: no current was passing, electricity had nothing to do with the accident, and *Gorris* v. *Scott*[8] was cited. But Lord Goddard C.J. said[9] ". . . it does not seem to me, "therefore, that it matters whether the injury which the man "received was an electrical burn or shock or some other form of "injury, provided that it resulted from a defect in the electrical "joint and was therefore caused by a breach of regulation 6."

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[6] L.R. 9 Ex. 125.

[7] [1953] 1 W.L.R. 742; [1953] 2 All E.R. 117.

[8] L.R. 9 Ex. 125.

[9] [1953] 1 W.L.R. 742, 746.

I have not found any other case which deals with this matter. Reference was made in argument to *Nicholls* v. *F. Austin* (*Leyton*) *Ltd.*[10] and *Carroll* v. *Andrew Barclay & Sons Ltd.*,[11] but those cases do not appear to me to raise the point. There the question was whether there had been any breach, and it was held there had not. I find nothing there to throw light on the question whether there can be liability for injuries caused in one way by an admitted breach of a safety provision but not for similar injuries caused in a different way by a similar breach.

I do not think that there can be any general rule. In every case the problem is to ascertain the intention of Parliament from the terms of the statute—whether any and, if so, what civil liability is to be implied. If the statute is only aimed at preventing a certain kind of injury, then it seems reasonable to hold (as in *Gorris* v. *Scott* [12]) that civil liability only results if that kind of injury is caused by a breach. But in this case there is no question of limitation to a particular kind of injury: admittedly there would be liability for any kind of injury caused by material actually falling from the roof. What is here suggested is limitation so as to exclude injury which is not caused in a particular way, no matter what kind of injury it may be. Let me suppose, for example, that the roof had fallen so as to form an obstruction on the rails only a second or two before the bogie ran into it. Why should the implied enactment of civil liability be supposed to exclude that case? Section 49 is one of the sections whose purpose is to promote safety and prevent accidents, and I cannot see why it should matter just how the accident was caused provided that it was in fact caused by a breach of the section. I see no ground for imputing to Parliament an intention to make the mineowner liable for some of the consequences of his breach but to relieve him of liability for others. Let me take another case and suppose a widespread fall of the roof so that men in a travelling road or working place were cut off and suffocated: I find it difficult to suppose that Parliament intended to exclude civil liability in such a case.

Section 49 applies to working places as well as to travelling roads, and it was argued that inferring civil liability for all injuries caused by falls from the roof of a working place would lead to results which Parliament cannot have intended. For example, if a piece of stone fell from the roof of a working place and later a man coming to or going from his working place tripped over it and was injured, it was said that it would be unreasonable to hold the mineowner liable subject only to the possibility of a defence under section 102 (8), particularly if the piece of stone had been lying unheeded for a long time. But in such a case it might be that something had happened to break the chain of causation, and that the cause of the man's injuries was something subsequent to the fall from the roof. And one must also take the case of a fall of the roof behind a miner when he is working, and I am not at all convinced that it would be unreasonable or that Parliament cannot have intended that there should be civil liability if the man suffered injury through being trapped or through hurrying over the debris to reach safety in case a further fall should occur. I do not profess to be familiar with conditions at a working place, but the argument from conditions there does not appear to me to be such as to require an unusual limitation to be attached to civil liability in respect of breaches of section 49.

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[10] [1946] A.C. 493.

[11] [1948] A.C. 477; 64 T.L.R. 384; [1948] 2 All E.R. 386.

[12] L.R. 9 Ex. 125.

The Lord Justice-Clerk used the phrase,[13] "a new and static "set of circumstances." But he indicated that in his view causal connexion between the breach and the accident was not established. If that were so I would agree with his reasoning, but I have given my reasons for holding that the breach did cause the accident. Lord Patrick said [14]: "The mischief, the obstruc-"tion on the road, may have been the natural and probable "consequences of a breach of the duty imposed by section 49 to "make the roof secure, but it was not the mischief which that "section was designed to prevent." In my view, the mischief cannot be so narrowly limited: the section was designed and intended to prevent falls from the roof causing injury to miners, and this fall did cause injury to the appellant.

The matter can be put in another way: to whom does the owner owe a duty to support the roof? If only to those who are immediately below it, then this appeal would fail, because the breach of section 49 ceases when the roof fell. But that view would equally exclude liability if the roof had fallen a few seconds before the bogie collided with the obstruction caused by the fallen material. And I do not think that the duty can be confined to those in the vicinity. The duty must, I think, be to those who ought reasonably to have been in contemplation as likely to be injured as a result of the breach, and it appears to me that this must at least include all miners who, in the ordinary course of their work and without any unusual or unforeseeable occurrence, sustain injuries caused by the breach. There was nothing unusual or unforeseeable in this case. If a roof falls on rails the next bogie travelling on the rails may well run into the obstruction, and there is no averment to show that that was not a probable consequence in this case.

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[13] 1955 S.L.T. 287, 289.

[14] Ibid. 290.

Then it is said that injuries caused by material which has fallen and become an obstruction are excluded because obstruction is dealt with by section 47, which provides that every haulage road shall be kept clear of obstruction as far as possible. But, again, take the case of material falling only a few moments before the bogie runs into it. It would not be possible to remove that before the accident, so that section 47 would not apply. Is the mere presence of section 47 to modify an otherwise general implied enactment that there shall be civil liability for injuries caused by breach of section 49 by adding an exception? It would not be a very easy exception to draft: I suppose it would be that there shall be no civil liability under section 49 if the fallen material which causes the injuries shall have become an obstruction in a haulage road before the injuries are sustained. Section 47 deals with haulage roads and section 49 with travelling roads. In this case it is admitted that at the relevant time the Dook was both a haulage and a travelling road, and it may often be the case that a road comes within both classes. But I do not think that a limitation of civil liability under section 49 can be inferred from the existence of another section which purports to deal with a different class of road from that dealt with by section 49.

I am therefore of opinion that this appeal should be allowed. The case must go back to the Sheriff Court for the assessment of damages.

LORD TUCKER. My Lords, the decision of this case depends entirely upon the application of section 49 of the Coal Mines Act, 1911, to the facts which have been admitted on the pleadings or by counsel at the Bar. These admissions include the following: (1) that a fall of redd or stone from the roof of a travelling road occurred; (2) that when this redd or stone fell the roof was insecure; (3) that this fallen redd or stone caused the derailment of the bogie on which the pursuer was travelling; (4) that the pursuer was injured as a result of the derailment of the bogie.

The difficulty which I have felt is whether it has been sufficiently averred and admitted that the roof was insecure at a material time. It is not, I think, permissible in a case which falls to be decided on the pleadings to speculate or draw any inference as to the length of time that had in fact elapsed since the fall of redd. It is, in my view, essential for the pursuer to prove that the roof was insecure at some moment of time which can be causally related to his accident. Section 49 applies to working places as well as travelling roads, and I am far from satisfied that this section enables a miner to recover damages merely by proving that he has tripped over a piece of stone that has fallen from the roof of a working place at some unascertained time. I am not, however, prepared to differ from the views of my noble and learned friends, Lord Reid and Lord Keith of Avonholm, that the pleadings in the present case sufficiently aver a fall at some material time. If this is correct no question arises as to any break in the chain of causation.

Once this difficulty is overcome, I think the appeal must succeed, since I agree with my noble friend, Lord Reid, that where the object of an enactment is to promote safety there can be no implication that liability for a breach is limited to one which causes injury in a particular way, and that *Gorris* v. *Scott*[15] is to be distinguished on the ground that the implied civil liability in that case was limited to breaches causing or contributing to the spread of disease.

I would accordingly allow the appeal.

LORD KEITH OF AVONHOLM. My Lords, the facts which are intended to raise the legal question which was argued to your Lordships are in very small compass. The pursuer is a mineworker, and on the night of May 31/June 1, 1953, was employed by the defenders, in company with another man, in extending a conveyor belt in the underground workings of the Minto Colliery, Lochgelly. On completing his work about 6 a.m. he proceeded to make his way out of the underground workings. In order to reach the surface the pursuer required to travel in the man-haulage in the Bogie Dook in the said colliery. Along with another man he sat in one of the empty man-haulage bogies which then started to travel up the said Dook. After travelling some distance up the Dook the bogie in which the pursuer was sitting ran over some redd or stone which had fallen from the roof of the Dook and the bogie was derailed. The pursuer was flung out of the bogie and sustained certain injuries. As a point was raised on the pleadings, I should say that all the facts I have set out are averred by the pursuer and admitted by the defenders. The pursuer goes on to aver that the accident was due to the breach by the defenders of section 49 of the Coal Mines Act, 1911, which says, inter alia: "The roof and sides of every travelling road . . . "shall be made secure . . ." He then avers that the Bogie Dook is a travelling road and that the said section 49 applies thereto. He refers to the duty of the defenders to comply with the provisions of section 49, specifies the manner in which the defenders failed to keep the roof secure "so as to prevent the "fall of redd from the centre of the roof on to the rails"; and avers that had the defenders complied with the provisions of section 49 and made and kept the roof secure the accident to the pursuer would not have happened. Beyond referring to section 49 for its terms the defenders deny these averments.

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[15] L.R. 9 Ex. 125

I agree with my noble and learned friend, Lord Reid, that there is no substance in the defenders' criticism of the adequacy of the pursuer's pleadings. I would observe also that the defenders have no plea that calls for an inquiry into the facts. They have only two pleas: one that the pursuer's averments are irrelevant and insufficient in law to support the crave of the writ, and the other that the damages claimed are excessive. On their plea to relevancy the pursuer's averments must be taken pro veritate. Their denial of these averments goes, therefore, merely to a denial of their liability at law upon the facts averred. The pursuer's averments, fairly read, must, in my opinion, be taken as meaning that the fall had taken place some time during the pursuer's shift and that what fell from the roof fell in part at least onto the rails and was not insignificant in amount. It was in fact "redd," as averred, which in mining and other parlance means rubbish or waste material, and, according to the pursuer's averment, which, as I have said, must be accepted as true, it fell "from the centre of the roof onto the rails." If the facts were otherwise, it was for the defenders to aver them and to ask for a proof.

There remain for consideration the two questions of law which were argued in the courts below and in this House, namely, what is the scope of section 49 in relation to the protection of persons working in a mine and, if the section is wide enough in scope to be relevant to the type of accident that happened here, whether breach of the section is causally connected with the accident.

On the facts admitted there clearly was a breach by the Coal Board of section 49. This was indeed admitted in the courts below, as stated by the Sheriff-Substitute in the Sheriff Court and by Lord Patrick and Lord Birnam in the Court of Session, if not conceded before this House. It was maintained, however, for the defenders that the section was intended to ensure the safety of a mineworker only against a direct or indirect hit by some material falling from an insecure roof. The Lord Justice-Clerk, in his opinion, did not go so far as this. He said[16]: "There might be a case where injury happened so soon after the "fall and was so intimately connected with the fall that it would "not avail the defenders to say that their liability had ceased "because the fall was over." This, I think, might be a relevant consideration on the question of causation, but it would appear to throw loose the whole question as to the nature of the protection afforded by the section. Lord Birnam does not deal with this point. He regards the effects of the fall from the roof as having spent themselves and the roof as being secure at the time of the accident. He thus arrives at the easy conclusion that the accident was not caused by a breach of section 49. Lord Patrick goes, I think, furthest in the defenders' favour. He says[16]: "Section 49 in terms deals only with the roofs and sides of "travelling roads and working places. These are to be made "secure, obviously against the risk of material falling on men "travelling on or working in them. It is silent as to any duty "to keep the floors of travelling roads and working places free of "obstructions, and yet when the statute wishes to impose such "an obligation it does so in other sections in express terms and "with or without qualification according to the circumstances "with which it is dealing." He is referring in this last sentence to sections 42 to 47 of the Act, and particularly to section 47, which enacts: "Every haulage road shall be kept clear as far as "possible of pieces of coal and other obstructions." Later his Lordship says[17]: "The pursuer must therefore establish the "existence of such a duty, if it exists, not by founding on a "breach of section 49, but by founding on section 47 of the "statute or by alleging a breach of duty under the common law "to take due care."

My Lords, I cannot find any sure ground for limiting the protection afforded by section 49 to protection against what I may call a hit, or a near hit, from falling material. The roof or sides of a travelling road, or a working place, might fall or cave in without any immediate injury to a man, either close to or some distance from the man, and he might die hours afterwards

[16] 1955 S.L.T. 287, 289.

[17] Ibid. 290.

from suffocation as a result of all means of egress and ventilation being stopped. Other types of accident can be imagined, as, for instance, by falls damaging haulage or electric apparatus with consequent injury to workmen. No doubt a direct hit may be the commonest, or most likely, type of injury caused, or to be contemplated, from an insecure roof, but I cannot, with any confidence, say that that was all the statute contemplated. I can deduce from the language used only that the section was passed for the protection of workmen and that if a workman is injured by a breach of the statute he has a remedy in damages against his employer. There may be some other statutory provision, or regulation, on which he can rely, but there is no reason why protective provisions may not overlap and it is common experience to find an injured workman relying, sometimes successfully, on breach of two or more statutory provisions or regulations.

Reference was made to the case of *Gorris* v. *Scott.*[18] This case might be in point if it could be postulated that section 49 was confined to protecting workmen from injury through being hit by falling material. As Lord Patrick put it,[19] the obstruction of the road would not be the mischief which the section was designed to prevent. But, for the reasons I have given, *Gorris* v. *Scott*[20] cannot, in my opinion, be invoked here.

There remains the question of causation. The case for the defenders was put most clearly by Lord Birnam when he said that the true cause of the accident was not the fall of the roof but the failure to clear away the resulting debris. He regarded the breach of section 49 as having been spent at the time of the accident. It is, in my opinion, not possible so to regard the matter. It does not, in my view, matter whether the fall took place a few minutes before the accident, or a few hours before the accident. Presumably the fall had not been discovered before the accident or the defenders would have done something about it. Either they knew of it or should have known of it and did nothing about it, or they, without any blame on themselves, knew nothing about it. I take the hypothesis most favourable to them, though I do not think it matters. A second failure in duty could hardly relieve them from the consequences of the first failure. On this view, I see nothing to break the causal chain between the breach of duty and the injury which followed. The fall from the roof caused the obstruction; the pursuer was injured by the obstruction; the pursuer was injured as a result of the fall which caused the obstruction and which, ex hypothesi, was due to a breach by the defenders of their duty under section 49. Unless there were some fresh circumstances introducing a novus actus interveniens, the initial breach of duty cannot, in my opinion, be regarded as spent.

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[18] L.R. 9 Ex. 125.

[19] 1955 S.L.T. 287, 290.

[20] L.R. 9 Ex. 125.

I would allow the appeal.

Lord Somervell of Harrow. My Lords, as I have come to a conclusion which differs from that of the Second Division of the Court of Session, I will briefly state my reasons.

I agree with the Lord Justice-Clerk that the case turns on the ambit of section 49. That section makes it an offence not to make secure the roof and sides of every travelling road and working place. Its object is to prevent a fall or collapse. There may be an offence although there has been no fall. The fall is not the offence but the consequence of it. Whether the fall injures anyone is irrelevant to the offence.

It is admitted that the pursuer, in order to reach the surface after his work, had to travel, as he did, on the man-haulage in the Bogie Dook, a haulage road which was also a travelling road. It is admitted that the bogie on which the pursuer was travelling was derailed by some redd which had fallen from the roof. It is admitted that this derailment caused the injuries for which the claim is brought. It was admitted before the Sheriff-Substitute, though, I think, not on the pleadings, that the fall of the redd was due to a breach of section 49. No novus actus interveniens was suggested.

It is submitted for the defenders that the only injuries resulting from a failure to make secure which can give rise to civil liability are those due to direct impact between the falling roof or collapsing sides and the miner. I am unable so to restrict its ambit. It was not suggested that there was anything unusual in a travelling road having rails on which man-haulage bogies are run. So far as such roads are concerned the risk of derailment may well be greater than that of a direct hit. As a danger it seems to me equally obvious. Another example of an obvious danger was suggested in the course of the argument. The roof and sides might collapse as a result of their not being made secure, so that a travelling road would be totally obstructed. Men might be cut off and die or suffer injuries from lack of air or food. This again seems to me an obvious possible result of a failure to make secure, though no man would be injured by impact. I, therefore, cannot agree that the section is silent as

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to obstructions except on the basis that it is silent, as it is, as to all consequences including direct impact. Total or partial obstruction is an obvious consequence of a fall and is, to my mind, an obvious possible cause of danger, two examples of which I have set out.

It is said that the application of the section to working places creates a difficulty in that the only danger there would be from impact. I will accept this, though I have no sufficient knowledge to affirm it. This does not, to my mind, create any difficulty. Assume three possible mischiefs prima facie within the ambit of a statutory prohibition. The fact that one only can occur in part of the locality covered by the prohibition would not in itself be any argument for excluding it.

It is submitted that the prima facie ambit of section 49 is limited by section 47. One may find in a statute a section plainly intended by its wording to deal with all cases of X, although, if it had not been there, some cases of X would have arisen and been differently dealt with under another section. It seems to me impossible so to construe section 47. On its wording it is not dealing with the same area as section 49. It is only the fact that, as in the present case, a haulage road may also be a travelling road that makes the argument possible. There is a further difficulty. Section 47 would apply to obstructions which were not the result of any antecedent breach. One would want clear words to include in the same provision obstructions which were the result of an antecedent breach. That argument, I think, fails.

The point is a short one. I differ because I am unable to hold that the "mischief" of derailment by a fall from an insecure roof is not within the ambit of the section. I would allow the appeal.

Appeal allowed.

Solicitors: *Beveridge & Co. for J. & A. Hastie, S.S.C., Edinburgh, and Macbeth, Currie & Co., Dunfermline; D. H. Haslam for James Allan, Edinburgh.*

F. C.

[HOUSE OF LORDS.]

H. L. (Sc.)* GLASGOW CORPORATION . . . . APPELLANTS;

AND

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Jan. 23, 24;
Mar. 1.

WESTERN HERITABLE INVESTMENT CO. LTD. . . . . RESPONDENT.

Housing—Financial assistance—Sale by owner—Construction of houses promoted by local authority—Application for annual grant on special conditions—Right of owners to sell—Housing (Financial Provisions) Act, 1924 (14 *&* 15 *Geo.* 5, *c.* 35), *s.* 3 (2) (*c*).

By section 3 (2) of the Housing (Financial Provisions) Act, 1924, " . . . houses, the construction of which is promoted by a local " authority in accordance with section 2 of the [Housing, etc., Act, " 1923,] . . . shall be deemed to be subject to special conditions " if . . . the local authority . . . undertake . . . that the following " conditions will be complied with in relation to the houses: . . . " (*c*) that no house shall be sold . . . except with the consent of " the Minister . . ." (in Scotland the Secretary of State for Scotland). In respect of houses so promoted the local authority was entitled to an annual subsidy from the Treasury.

Private builders, having applied to a local authority for financial assistance in erecting houses within the Act, received from it an annual subsidy in respect of each house on the terms (inter alia) that each house should comply with the special conditions of section 3 (2) of the Act of 1924, including condition (*c*). For several years the builders received annual subsidies accordingly:—

Held, that the builders were not debarred from selling any of the houses, without the consent referred to, either by the terms of the Act or of the contract between themselves and the local authority, the only consequence of such a sale being the discontinuance of the subsidy in respect of the house sold; the receipt of aid was conditional on compliance with the conditions.

Decision of the Second Division of the Court of Session affirmed.

APPEAL from the Second Division of the Court of Session.

In this appeal from the unanimous decision of the Second Division of the Court of Session (Lord Justice-Clerk Thomson, Lord Patrick, Lord Mackintosh and Lord Blades) the appellants, the Glasgow Corporation, sought to reverse (a) an interlocutor pronounced by the Lord Ordinary (Lord Walker) on February 4, 1955, granting decree in terms of the conclusions of the summons, and (b) an interlocutor pronounced by the Second Division on

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* *Present*: VISCOUNT SIMONDS, LORD REID, LORD TUCKER, LORD KEITH OF AVONHOLM and LORD SOMERVELL OF HARROW.

July 21, 1955, affirming the interlocutor of the Lord Ordinary. The respondent company, Western Heritable Investment Co. Ltd., raised the present action against the appellants and also against the Secretary of State for Scotland, to have determined (inter alia) their right to sell certain dwelling-houses owned by them in Glasgow.

The respondents, a company incorporated under the Companies Acts, built for letting in the years 1926 to 1933 over 6,000 cottage flats in the King's Park and other districts of Glasgow. Under a contract with the appellants they received an annual subsidy of from £9 to £13 10s. per house, the Secretary of State or his predecessors, the Scottish Board of Health, contributing £9 a year.

The facts, which were not in dispute, were stated by the Lord Ordinary as follows: "About May, 1926, the Corporation of "Glasgow issued a statement setting out the terms and conditions "on which they were prepared to grant financial assistance to "private enterprise in the building of houses. In respect of "houses erected for letting, the corporation were prepared to "make a maximum grant of £13 10s. per house for a period of "40 years. Houses in respect of which such an annual sum "would be payable had to comply with four of the five special "conditions of section 3 (2) of the Housing (Financial Provisions) "Act, 1924. The [respondents] applied for, and the corporation "paid, an annual grant in respect of some 6,000 cottage flats "erected by the [respondents] between the years 1926 and 1933 "in various districts of Glasgow. The corporation in their turn "received from the Secretary of State or his predecessors, the "Scottish Board of Health, a contribution of £9 per house. "Most of the houses have remained in the ownership of the "[respondents] and are subject to all the special conditions of "section 3 (2) of the Act of 1924. In compliance with those "conditions the [respondents] had been reletting the houses, as "they fell vacant, to resident tenants at restricted rents, but "since the end of 1952 they have ceased to relet vacant houses, "because they say that, having regard to rising costs, they have "found that course to be an uneconomic one. They have asked "the Secretary of State to consent to a sale of the houses but "consent has not been given."

The statement issued by the corporation (No. 18 of process) was headed "Terms and Conditions of Assistance to be granted "to Private Enterprise by the Corporation." It continued: "The assistance offered by the corporation in respect of houses

" erected by private enterprise will only apply to those houses " which are certified by the director of housing as qualifying " for the subsidy, in terms of the Housing Act, 1923 to 1925, " and complying with the conditions set out in the appended " schedules."

After dealing with lump sum subsidies, the statement continued: " As an alternative . . . the corporation are prepared, *in " respect of houses erected for letting only*, to make a maximum " grant of £13 10s. per house for a period of 40 years to the person " for the time being in receipt of the rent payable by a tenant to " whom the house is let . . . .

" (a) The houses in respect of which an annual subsidy is " payable must comply with the conditions as to type and size " included in Schedule I hereto, and must also comply with the " following special conditions of section 3 (2) of the Housing " (Financial Provisions) Act, 1924: (i) That the houses shall " be let for occupation to tenants who intend to reside therein; " (ii) That it shall be a term of every such letting that the tenant " shall not assign, sublet or otherwise part with the possession " of the house, or any part thereof, except with the consent in " writing of the local authority or some person authorized by them " in that behalf, and that such consent shall not be given unless " it is shown that no payment other than rent has been or is to " be received by the tenant in consideration of the assignment, " subletting or other transaction; (iii) That no house shall be sold " or (save by such lettings as aforesaid) otherwise disposed of " except with the consent of the Board of Health, which may be " absolute or subject to such reasonable stipulations as the Board " thinks proper, including, if the Board thinks fit, stipulations for " the reduction of the amount or the curtailment of the duration " of any contribution payable by the Board in respect of the " house, or for both reduction and curtailment, but so nevertheless that the contribution in respect of any house sold before " the expiration of the period of 20 years from the date when the " contribution first became payable shall not be reduced by more " than £3, and the duration thereof shall not be curtailed by more " than 20 years, and (iv) That the rent charged in respect of any " house shall not exceed the appropriate normal rent together " with a sum equivalent to the average excess, if any, above the " appropriate normal rent which can be charged by the local " authority in accordance with this section in the case of houses " provided by the local authority themselves, and that no fine, "premium, or other like sum shall be taken in addition to the "rent.

"(b) Persons or other bodies erecting houses eligible for annual "subsidy will be required to enter into an agreement with the "corporation undertaking (i) To comply with the special conditions above detailed and (ii) To produce to the authorized agents "of the corporation for inspection when required the rent books, "tenancy agreements, and such documents or other evidence as "may be required to enable the corporation to satisfy themselves "that the special conditions of the subsidy are being complied "with."

The respondents made application for assistance on the above terms and conditions and the form of application contained the sentence: "It is understood that this application will not form "the basis of a contract until an acceptance has been received "from the Town Clerk, stating that the corporation have approved "the proposal." The corporation approved the proposal and a subsidy varying between £9 and £13 10s. per house was paid annually to the respondents.

In this action the respondents sought a declaration that they were entitled to sell the houses, without the consent of either the Secretary of State for Scotland or the appellants, but subject to the power of the appellants to discontinue payment of the subsidy to them in respect of any houses so sold. The Secretary of State lodged defences, but these were withdrawn before the record was closed.

R. S. Johnston Q.C. and *Douglas Reith* (both of the Scottish Bar) for the appellants. On the true construction of the relevant Acts there is a statutory provision creating an absolute bar against the sale of the houses without the consent of the Secretary of State for Scotland. The building of the houses was promoted by the appellants under section 2 of the Housing, etc., Act, 1923. The appellants undertook, in accordance with the rules made by the Board of Health, that the conditions in section 3 (2) of the Housing (Financial Provisions) Act, 1924, would be complied with. These Acts were part of the then housing code, of which the principal Act was the Housing of the Working Classes Act, 1890, with which they must be read. Their purpose was to encourage the provision of housing accommodation for letting to the working classes.

The special conditions in section 3 (2) represent the state of matters which must exist before a payment can be made—the conditions precedent to a subsidy. They are, alternatively, obligations to be complied with in the future. Note the words "subject to special conditions." The condition in section 3 (2) (*c*) stamps the houses with a prohibition against sale. Section 2 (4) of the Act of 1923 gave the local authority power to impose conditions when it gave assistance in the building of houses. In the Act of 1924 these were translated into special conditions. Section 3 (2) gave wide powers to the local authority and did not limit the conditions. From the terms of the Act there can be extracted a power to limit the owner's power of sale, creating a real burden on the houses so as to make them inalienable for all time. The conditions are deemed to affect the houses themselves. The local authority having given an undertaking in terms of section 3 (2), the result is that the owner of the houses is put under a legal disability. The houses become subject to the special conditions in the future and are not subject to them merely to qualify for a subsidy at the particular time. The local authority can only give its undertaking if the builder of the houses is to be bound to observe the conditions in the future, for the local authority's undertaking is that the special conditions will be observed. As between the appellants and the Board of Health it was necessary that the respondents should be bound by the special conditions in order that the appellants should be able to undertake to the Board that the special conditions would be complied with and thus give the Board the necessary warrant to pay, and the appellants the necessary right to receive, the annual contribution.

On the contractual aspect of the matter, the respondents have contracted with the appellants not to sell any of the houses without the consent of the Secretary of State and have accepted the stipulated money payments on that express condition. The contract was entered into for one purpose. When the grant was applied for and the proposal in the application form was accepted a contract was complete on the terms of the statement issued by the appellants. There was an express and unequivocal undertaking by the respondents to comply with the conditions set out. That contract contains an absolute prohibition against the sale of the houses without consent. Condition (iii) is relied on. Whatever the position may be under the Acts, the respondents have so bound themselves. It does not follow because there are repeated in the contract conditions which are found in the Act that, in construing the contract, one is limited to the same construction as that of the Act. The effect is to impose on the houses a real burden in perpetuity.

C. W. Graham Guest Q.C. (*Dean of the Faculty*) (of the English Bar, Q.C. of the Scottish Bar) and *A. M. Johnston* (of the Scottish Bar) for the respondent company. On the true construction of the Acts of 1890 to 1924 the respondents are entitled to sell without the consent of the Secretary of State any of their houses which are deemed to be subject to the special conditions and there is no power to enforce the condition under section 3 (2) (*c*). Nor is there anything in the contract to prevent them from selling. The effect of their selling a house is that they are no longer entitled to receive a subsidy in respect of it.

The question is one purely of statutory construction, and on this the views of the Second Division were correct. The only question is whether the condition in section 3 (2) (*c*) of the Act of 1924 imposes a real burden running with the land and affecting successive owners so that a sale without consent would be a nullity. If it is not a burden running with the land, the respondents are entitled to the declarator which they seek. In isolation the phrase " no house shall be sold " might seem to impose such a prohibition, but it must be considered in its context. In particular section 3 must be read with section 2.

It is inherent in the law that the freedom to dispose of one's own property shall not be held to be taken away save on clear and unequivocal language. A statute will be read, if possible, in favour of freedom of disposal. There is no reason why the respondents should not dispose of the capital they have invested in these houses. *Tailors of Aberdeen* v. *Coutts*[1] provides the classical definition of a real burden and indicates that the whole idea of imposing on property such a burden as is here suggested is contrary to the law of Scotland.

The scheme of the Act is for the granting of annual subsidies and under it compliance with the conditions is a condition of assistance by the subsidy. The clue to the interpretation of the Act is section 3 (4), which indicates the outlook of Parliament where the undertaking is not given or the special conditions are not complied with.

The position under the contract is no different from the position under the Act. The conditions in the contract are the clear counterpart of the conditions in the Act. They were quoted in the statement, not as substantive conditions of the contract with which the respondents were bound to comply, but as conditions

[1] (1840) 1 Rob. 296, 305–306.

governing the right to receive annual payments, the right continuing only so long as the houses are let. Failure by the respondents to comply with the conditions regarding sale had the same effect on their right to receive annual payments from the appellants as it had on the right of the appellants to receive annual contributions from the Treasury. That is to say, the respondents are not prohibited from selling, but a sale without consent deprives the respondents of their right to the subsidy and the appellants of their right to the contribution.

The argument for the appellants leads to a different agreement between the local authority and the State, on the one hand, and the local authority and the builder, on the other. It would be illogical if, in the case of non-compliance with the conditions, the only penalty for the local authority was withdrawal of the contribution, while for the builder the contract was so much more stringent.

R. S. Johnston Q.C. in reply. It is illegal for the respondents to say that they need not fulfil their part of the bargain and that the only result of their not doing so is that the appellants need not fulfil theirs. The Secretary of State can refuse his consent to a sale and such a refusal has not been challenged as ultra vires.

Their Lordships took time for consideration.

March 1. Viscount Simonds. My Lords, this appeal is brought by the appellants, the Corporation of the City of Glasgow, against the unanimous decision of the Second Division of the Court of Session which affirmed an interlocutor of the Lord Ordinary, Lord Walker. The case is not without difficulty, but the able argument of learned counsel for the appellants has not satisfied me that it has been wrongly decided.

[His Lordship stated the facts and continued:] The appellants contend that refusal of the Secretary of State operates as an absolute bar to the sale by the respondents of houses which are their absolute property. Two reasons for this result are advanced: the first rests solely on the terms of the statutes which I will examine; the second on a contractual basis.

The Housing, etc., Act, 1923, introduced a novel feature into the legislation dealing with the provision of houses for the working class. It authorized for the first time a subsidy or contribution by the Board of Health towards the provision of such houses by local authorities. The contribution could be either a lump sum for each house or an annual sum of £6 for a period of 20 years. Such contributions were to be made direct to the local authorities who were themselves authorized to promote the building of such houses by giving assistance in various ways, including (1) the grant of lump sum payments after completion of the houses, (2) the payment of annual sums for a period not exceeding 20 years, and (3) the undertaking to pay any part of the periodical sums payable to a building society in respect of advances made as therein mentioned.

The Housing (Financial Provisions) Act, 1924, increased the board's power of contribution to £9 per annum for 40 years if the houses were subject to special conditions as thereinafter provided in the Act. These conditions, so far as relevant, were in the case of houses provided by the local authority that (1) the houses should be let for occupation by tenants who intended to reside therein; (2) that every letting should contain a term against assignment or subletting except as therein mentioned; (3) that if the local authority desired to sell or (save by such lettings as aforesaid) dispose of the houses such sale or disposal should not be effected except upon and subject to such stipulations as the Minister might think proper for the reduction of the amount and curtailment of the duration of any contribution payable by him in respect of the house; and (4) that the rents should be restricted as therein mentioned.

The position then was that a local authority could get (a) a lump sum grant, or (b) under the Act of 1923 an annual contribution without special conditions, or (c) under the Act of 1924 an increased annual contribution with special conditions attached to the grant. And it is clear that the local authority could sell such houses as it thought fit subject only to the possible penalty of the contribution of the Minister, if it was on the higher scale under the 1924 Act, being reduced.

But the Act had to provide for two classes of houses: (a) those provided by the local authority itself, with which I have dealt; (b) those "promoted" by the local authority, i.e., houses built by private enterprise in respect of which they had undertaken to give financial assistance. In regard to these latter houses (with which this appeal is concerned) the Act makes the somewhat curious provision by section 3 (2) that they shall be "deemed to be subject to special conditions" if the local authority undertakes, in accordance with rules made by the Board and approved by the Treasury, that certain conditions thereafter specified would be complied with in relation to the houses. These conditions are substantially those which I have already set out except that the restriction upon sale is more stringent. It is that "no house shall be sold or (save by such lettings as aforesaid) otherwise disposed of except with the consent of the Minister, which may be absolute or subject to such reasonable stipulations as the Minister thinks proper, including, if the Minister thinks fit, stipulations for the reduction of the amount or the curtailment of the duration of any contribution payable by the Minister in respect of the house," within the limits therein stated (section 3 (2) (*c*)). The appellants no doubt gave in respect of the houses here in question the appropriate undertaking and they are accordingly deemed to be subject to the special conditions. The question is what is the result of their being so subject.

My Lords, I cannot accept the contention of the appellants that the result is to create a real burden upon a house so subject which could make it inalienable for all time. I say "for all time," for learned counsel was constrained to admit that his contention led to that result. The right of an owner of property freely to dispose of it is so inherent in ownership that I should not regard it as displaced except by very clear words. Far from that being the case here, the Act clearly contemplates the sale of a house with or without the consent of the Minister, for by section 3 (4) it makes specific provision for the event of any undertaking given under the section or any of the special conditions to which a house is subject under the section not being complied with, and that provision exactly accords with the scheme of the Act, viz., that the Minister may withdraw or reduce his future contributions. In effect this receipt of aid is made conditional upon compliance with conditions—a workmanlike and reasonable arrangement. I concur so fully with the judgments of the Lord Ordinary and their Lordships of the Inner House that I do not think it necessary to add anything on this part of the case.

The alternative ground of appeal was based on an alleged contract between the parties containing an absolute prohibition against sale without the consent of the Secretary of State. It was not, I think, suggested that this would bind anyone except the respondents themselves, and it is not clear to me whether, according to the practice of the Scottish court, an interdict would be granted to restrain a sale even if the appellants were otherwise right in their contention. But, in my opinion, they are clearly wrong, for the reasons given by the Lord Ordinary and affirmed in the Inner House.

In May, 1926, as I have already said, the appellants issued a statement by which they offered financial assistance for building houses, and the respondents applied for assistance upon the terms of that statement. That they are bound by those terms is clear. But that is not enough for the appellants unless upon its true construction the contract imposes an absolute obligation against sale without consent. In my opinion, it does not. The statement purports to be a statement of " the terms and con- " ditions of assistance to be granted to private enterprise by the " corporation." It begins by saying that the assistance will only be given in respect of houses certified as therein mentioned and " complying with the conditions set forth in appended schedules." Then, after dealing with assistance by way of lump sum subsidy, it provides, in respect of houses erected for letting only, for an annual maximum grant of £13 10s. per house for a period of 40 years to the person for the time being in receipt of the rent of that house. Then come the words upon which the appellants rely: " The houses in respect of which an annual subsidy " is payable must comply with the conditions as to type and " size included in Schedule I hereto and must also comply with " the following special conditions of section 3 (2) of the Housing " (Financial Provisions) Act, 1924." These conditions are then set out verbatim with the exception of the condition as to fair wages. I will assume, as I have said and as was conceded by the respondents, that, having applied for assistance upon these terms, they were bound by them. But it is clear that the purpose of introducing them into the bargain between the appellants and the respondents was to ensure that the obligation of the former to the Secretary of State was fulfilled so that they might not remain liable to the respondents when he was no longer liable to them. The contract can and should be read in this way. I am content to adopt the words of the Lord Ordinary. " In such a " framework and context," he said, " I can find no warrant for " reading in, as an independent stipulation of the contract, that " the pursuer company undertake that the houses shall not be " sold." I agree, and think that the legitimate and proper construction of the bargain is that, if and so long as the terms are complied with, the respondents may expect their subsidy: if they are not complied with, the respondents will be in mercy.

I would dismiss this appeal with costs.

My Lords, my noble and learned friend Lord Tucker, who is unable to be here this morning, has asked me to say that he has read my opinion, agrees with it, and has nothing to add.

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LORD REID. My Lords, in this case the respondents seek a declarator that they are entitled to sell certain dwelling-houses in Glasgow which belong to them, and the appellants maintain that they are not entitled to sell any of these houses without the consent of the Secretary of State for Scotland. The consent of the Secretary of State has been refused in respect of certain houses for the sale of which consent was requested by the respondents.

The houses, about 6,000 in number, were built by the respondents between 1926 and 1933, and in respect of them the parties to this case entered into a contract under which the respondents have been receiving from the appellants an annual subsidy of from £9 to £13 10s. per house. Part of this subsidy is money which the appellants receive from the Treasury under the Housing (Financial Provisions) Act, 1924, and which they pass on to the respondents, and at least in some cases part of it is provided by the appellants themselves. The appellants found on the terms of this Act and also on the terms of their contract with the respondents in denying that the respondents are entitled to the declarator which they seek. The respondents admit that they would not be entitled to receive any further subsidy in respect of any house which they might sell but maintain that there is nothing either in the Act or the contract to prevent them from selling if they so desire.

The 1924 Act authorized local authorities, including the appellants, to promote the erection by private builders of houses for letting, and entitled a local authority, in respect of any house so promoted which complied with special conditions, to receive an annual subsidy of £9 for 40 years. There is nothing in the Act which expressly imposes any obligation or confers any right on the private builders who erect such houses, but it is implicit that the local authority cannot claim subsidy from the Treasury in respect of such a house unless that subsidy is passed on to the owner.

Section 3 (2) of the 1924 Act provides: "Houses . . . the "construction of which is promoted by a local authority in "accordance with section 2 of the said Act," [the 1923 Act] "as amended by this Act, shall be deemed to be subject to "special conditions if . . . the local authority . . . undertake, in "accordance with rules made by the Minister and approved "by the Treasury, that the following conditions will be complied "with in relation to the houses:—(*a*) that the houses shall be "let for occupation to tenants who intend to reside therein;

" (*b*) that it shall be a term of every such letting that the tenant " shall not assign, sublet, or otherwise part with the possession " of the house, or any part thereof, except with the consent in " writing of the . . . local authority or some person authorized by " them in that behalf, . . . and that such consent shall not be " given unless it is shown that no payment other than rent has " been or is to be received by the tenant in consideration of the " assignment, subletting, or other transaction; (*c*) that no house " shall be sold or (save by such lettings as aforesaid) otherwise " disposed of except with the consent of the Minister, which may " be absolute or subject to such reasonable stipulations as the " Minister thinks proper, including, if the Minister thinks fit, " stipulations for the reduction of the amount or the curtailment " of the duration of any contribution payable by the Minister in " respect of the house, or for both reduction and curtailment, but " so nevertheless that the contribution in respect of any house " sold before the expiration of a period of twenty years from the " date when that contribution first became payable shall not be " reduced by more than three pounds, or in the case of a house " in an agricultural parish by more than six pounds ten shillings, " and the duration thereof shall not be curtailed by more than " twenty years; (*d*) that a fair wage clause which complies with " the requirements of any resolution of the House of Commons " applicable to contracts of Government departments and for the " time being in force shall be inserted in all contracts for the " construction of houses; and (*e*) that the rent charged in respect " of any house shall not exceed the appropriate normal rent " together with a sum equivalent to the average excess, if any, " above the appropriate normal rent which can be charged by " the local authority in accordance with this section in the case " of houses provided by the local authority themselves, and that " no fine, premium or other like sum shall be taken in addition to " the rent." We were not referred to any relevant rules made by the Minister, or in Scotland the Secretary of State.

The method of drafting this subsection causes me some difficulty. A house is to be deemed to be subject to special conditions if the local authority, who are not themselves owners, give an undertaking in terms of the subsection. To say that X is deemed to be Y generally means that X is not in fact Y, but is to be treated for certain purposes as if it were Y, and, if that is the meaning here, then a house to which the subsection applies is not in fact made subject to special conditions but is only to be treated for certain purposes as if it were so subject. The main purpose of referring to special conditions in this subsection appears to be to bring in the provisions of section 2 of the 1924 Act, because it is only if houses are subject to special conditions that the subsidy of £9 per annum for 40 years is payable to the local authority by the Treasury, and the effect of deeming the house to be subject to special conditions is to enable that subsidy to be paid in respect of it.

But, if one merely takes the language of section 3 (2) in isolation, it is, I think, capable of meaning that, although the conditions contained in the local authority's undertaking could not normally affect the house, because the undertaking was not given by anyone who had a right to affect it, yet those conditions are to be deemed to affect the house itself. The appellants maintain that this is so. Although the Act nowhere expressly requires the owner of the house to carry out the terms of the local authority's undertaking or authorizes the local authority or the Secretary of State or anyone else to compel the owner to do so, yet it is said that the subsection must be held to mean that the fact that the local authority has given this undertaking in some way puts the owner of the house under a legal disability, so that, once the undertaking is given, he cannot, without the consent of the Secretary of State, sell the house. If that were so, it must, I think, follow that the owner is also put under a disability so that he cannot let the house otherwise than to a tenant who intends to live in it or do anything else which would be in contravention of any of these conditions. Moreover, I do not see how condition (*d*) regarding the fair wage clause fits in with this interpretation of the subsection. But, leaving that aside and taking only the alleged disability of the owner to sell, I do not see how such a disability could be enforced. For example, if the owner offered the house for sale, an intending purchaser might have no knowledge of the owner's disability, because there would be no notice of it in the Register of Sasines. Would a sale to such a purchaser be a nullity, or would the local authority or some other person be entitled to reduce the disposition to the purchaser? I cannot see how that could be. If it had been intended that the fact that the local authority had given this undertaking was to disable the owner from selling his house or from letting it to a tenant who did not intend to reside in it, I would have expected not only that this would be stated expressly but that some method of effectually preventing the owner from doing so would have been enacted. I find it difficult to suppose that so fundamental an interference with the owner's right of property would have been left to depend on an implication from this rather ambiguous subsection. It appears to me that the only purpose of deeming houses to which the subsection applies to be subject to special conditions is to bring in the provisions of section 2 and thereby enable the subsidy of £9 to be paid.

I am reinforced in this conclusion by the terms of section 3 (4): "If at the time it is shown to the satisfaction of the "Minister that any undertaking given under this section, or that "any of the special conditions to which a house is subject under "this section has not been complied with, any contribution payable in respect of the house may be discontinued or the amount "thereof may be reduced, and the duration thereof may be "curtailed, according as the Minister thinks proper." It appears to me that the discontinuance or reduction of the amount of subsidy is the only consequence which follows from the owner doing something with his house which is in conflict with the undertaking given by the local authority, and I am therefore of opinion that so far as the appellants' case is rested on the terms of the Act of 1924, it fails.

But the appellants also rely on their contract with the respondents. That contract arises in this way. In May, 1926, the appellants issued a statement offering financial assistance to private builders of houses which complied with a number of detailed requirements and complied with other conditions set out in the statement. The respondents then made application for assistance on the terms and conditions set forth in that statement, and their application contains the sentence: "It is understood "that this application will not form the basis of a contract until "an acceptance has been received from the Town Clerk stating "that the corporation have approved of the proposal." It appears that the corporation did approve of the proposal and that a subsidy varying between £9 and £13 10s. per house has been paid annually to the respondents.

The most important part of the statement, for the purposes of this case, is in these terms: "(*a*) The houses in respect of "which an annual subsidy is payable must comply with the "conditions as to type and size included in Schedule I hereto, "and must also comply with the following special conditions of "section 3 (2) of the Housing (Financial Provisions) Act, 1924." Then the statement sets forth at length the provisions (*a*), (*b*), (*c*) and (*e*), which are set out in section 3 (2).

The appellants rely on the words in the third of these provisions "that no house shall be sold . . . except with the consent "of" the Secretary of State, who is now the appropriate authority. They maintain that, whatever may be the position under the statute, the respondents have bound themselves by this contract not to sell without such consent. But these words must be read in their context. The statement requires compliance with "the following special conditions of section 3 (2)" and this is one of the "following special conditions." In my opinion the conditions set out in the statement, being referred to as the special conditions of section 3 (2), must be read as having the same meaning as they have in the Act itself. The purpose of inserting these conditions in the appellants' contract with the respondents is to make sure that the appellants do not have to continue to pay subsidy after the Treasury subsidy to the appellants has been discontinued by reason of the undertaking given by the appellants in terms of section 3 (2) being no longer fulfilled. Apart from the reference to section 3 (2) in the statement itself, I would be inclined to think that the conditions set out in the statement must have the same meaning as they have in the Act, but the reference to the section seems to me to put this beyond doubt. I have already said that, in my opinion, there is nothing in the conditions in the Act to prevent the respondents from selling their houses, and, if that be so, it follows that there is nothing in the contract which would have that effect. It is clear under the contract that if the respondents sell any of their houses, subsidy from the appellants in respect of those houses will cease at once, and the respondents admit this. But, in my opinion, the contract does not prevent the respondents from selling, and they are, therefore, entitled to the declarator which they seek.

I am, therefore, of the opinion that this appeal should be dismissed.

Lord Keith of Avonholm. My Lords, there is little I would add to what has already been said by your Lordships and by the judges in the court below. The contention that the houses are subject to a statutory condition which operates as a kind of real burden is, in my opinion, not supportable. I deal more fully with some of the statutory provisions under the other branch of the appellants' argument, and I would only here observe that the statutory condition invoked is couched in language very inapposite to impose any such restriction on the sale of the houses. It is relevant, I think, to look first at subsection (1) (*c*) of section 3 of the Act of 1924, which relates to houses provided by a local

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authority themselves. It seems clear that this subsection contemplates a sale by the local authority subject only to such stipulations as the Board (now the Secretary of State) thinks proper for reduction of the amount or curtailment of the duration of the State contribution in respect of the house, within certain specified limitations. At worst, all that could happen to a local authority in case of a sale would thus be withdrawal of the contribution. This cannot, in my opinion, be construed as involving a statutory prohibition of sale. It would be strange if, none the less, the legislature contemplated a statutory restriction of sale in the case of trust houses or promoted houses under paragraph (*c*) of subsection (2). The language here again seems to me very inapposite to effect any such result. The Secretary of State may give his absolute consent to the sale, with the result of leaving the contribution payable to the local authority unaffected, or may consent subject to reduction of the amount or curtailment of the duration of this contribution. (It is to be observed that it is the contribution to the local authority that is dealt with in subsection (2) (*c*) and not the subsidy payable by the local authority to the builder.) If, however, a house is sold without consent of the Secretary of State, subsection (4) of section 3 is brought into play, which provides for discontinuance of the contribution or reduction of its amount or curtailment of its duration in this and other cases. The statute thus, in my opinion, provides a complete code for what is to happen in the event of a sale with and a sale without the consent of the Secretary of State. That some further absolute prohibition of sale without consent of the Secretary of State is to be read into the statute is not, in my opinion, consistent with the provisions to which I have referred. To be effective, moreover, such a condition would have to be operative in some way at the instance of the appellants or of the Secretary of State, not only against the builder of the houses but against a purchaser from him. It is not enough to say that it can be enforced against the builder by an interdict. That is not the method of enforcing a real burden and does not meet the case where a house has in fact been sold. It would be necessary to say that if the builder has conveyed a house to a purchaser without the consent of the Secretary of State, the transaction is a nullity and the conveyance can be reduced, with the result of restoring the property into the ownership of the builder. It would be most anomalous for a third party who has no vestige of legal title or interest in the property to be able to produce such a result. But it is enough to say that there is nothing in the statute that says that any such result should follow a breach of the condition against selling a house, and such a result cannot, in my opinion, be implied. That is enough to dispose of the argument upon the statute.

The case on contract raises somewhat different considerations. It is relevant to this question to consider the statutory background. The Housing, etc., Act, 1923, by section 2 gave a local authority power to promote the building of houses of a certain type and size by private enterprise, by giving, or undertaking to give, financial assistance in the shape of annual sums specified in proposals approved by the Board for a period not exceeding 20 years and to impose conditions of such payments, also with the approval of the Board. The Act did not specify the nature or the terms of these conditions other than that the house should not be used otherwise than as a separate dwelling-house and should not be added to or enlarged except with the consent of the local authority. The Act, by section 1, also authorized the Board (now the Secretary of State) to make contributions out of moneys provided by Parliament towards the expenses incurred by a local authority in, inter alia, promoting the construction of such houses. This contribution was fixed by the Act, subject to a minor exception, at £6 per house per annum for a period of 20 years. This Act was amended by the Housing (Financial Provisions) Act, 1924, section 2 of which increased the annual contribution to a local authority in respect, inter alia, of promoted houses to £9 per house for 40 years "if the houses are subject "to special conditions as hereinafter provided in this Act." By section 3 (2) of that Act houses promoted by the local authority are deemed to be subject to special conditions if the local authority undertakes that certain specified conditions will be complied with. As the local authority was not itself, in the case of promoted houses, constructing the houses, it could not itself fulfil the conditions, and the manner in which it discharged its undertaking was to insert the statutory conditions in the conditions imposed upon the builders. Thus, in the present case the conditions agreed between the appellants and the respondents include verbatim the special statutory conditions (with one immaterial omission) with which the local authority undertook to comply for the purpose of obtaining the grant from the Secretary of State. By subsection (4) of section 3 it is provided that: "If at the time it is shown to the satisfaction of the "[Secretary of State] that any undertaking given under this "section, or that any of the special conditions to which a house "is subject under this section has not been complied with, any "contribution payable in respect of the house may be discon"tinued or the amount thereof may be reduced, and the duration "thereof may be curtailed, according as the [Secretary of State] "thinks proper." This provision is very relevant as pointing to the effect under the statute upon the scheme of annual contributions as between the Secretary of State and the local authority, but it has no application to the agreement or arrangement between the local authority and the builder in the matter of the local authority's subsidy in respect of the houses. It may seem reasonable to assume that what applies to the Secretary of State's contribution to the local authority should apply in turn to the local authority's subsidy to the builder, but the statute does not say so, and I can find no implication in the statute that this should be so. The appellants have introduced no corresponding provision into their agreement with the respondents. But what the statute has done is to authorize the local authority, with the approval of the Secretary of State, to impose conditions on the giving of financial assistance to promote the building of houses (section 2 (4) of the 1923 Act). Accordingly, in the Statement No. 16 of process, which was issued by the appellants and accepted by the respondents in their application for a grant, there appears the following: "(*a*) The houses in "respect of which an annual subsidy is payable must comply "with the conditions as to type and size included in Schedule I "hereto, and must also comply with the following special con"ditions of section 3 (2) of the Housing (Financial Provisions) "Act, 1924." There then follow the four special statutory conditions. The statement then proceeds: "(*b*) Persons or other "bodies erecting houses eligible for annual subsidy will be "required to enter into an agreement with the corporation "undertaking—(i) To comply with the special conditions above "detailed; and (ii) To produce to the authorized agents of the "corporation for inspection when required the rent books, "tenancy agreements, and such documents or other evidence as "may be required to enable the corporation to satisfy themselves "that the special conditions of the subsidy are being complied "with."

I have come to the view that the proper construction to put upon these clauses is that observance of these special conditions is necessary only in order to earn the subsidy. This seems to me also to fit in with the general purpose and intent of the statutes. If the building of small dwelling-houses had been an economic

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proposition, there would have been no need to encourage their building by proffering a subsidy. If the builder now finds that it is no longer an economic proposition to continue to accept a subsidy, there would seem to be no reason why he should not now forgo it. The provision of dwelling-houses will not be prejudiced. Once the houses were built (and it was not until they were built that subsidy became payable) it was improbable that they would be used for any other purpose. The population, so far as the houses went, would be housed, whether the houses were let or sold. If a builder chooses to sell a house without consent, he will forfeit the subsidy for that house. I find nothing in the agreement that compels me to the view that he cannot do so, and it would seem to me an unreasonable construction to hold that once he has accepted a subsidy he is restricted for all time in his freedom to deal with his own property.

I would dismiss the appeal.

LORD SOMERVELL OF HARROW. My Lords, I agree.

Appeal dismissed.

Solicitors: *Martin & Co. for Campbell, Smith, Mathison & Oliphant, W.S., Edinburgh, and The Town Clerk, Glasgow; Stilgoes for Gray, Muirhead & Carmichael, W.S., Edinburgh, and Breese, Paterson, Chapman, Glasgow.*

F. C.

J. C.*
1956
July 26.

MATTHEW JAMES McKENNA AND ANOTHER . . . APPELLANTS;

AND

PORTER MOTORS LTD. . . . . RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL OF NEW ZEALAND.

New Zealand—Landlord and tenant—Urban property—Hotel—Claim to possession—Intention to demolish and build garage—"Premises" required for landlord's "own occupation"—Meaning of "premises"—Tenancy Act, No. 76 *of* 1948, *of New Zealand (as amended by the Tenancy Amendment Act,* 1950, *and the Statutes Amendment Act,* 1950), *s.* 24 (1) (*h*) (*m*).

By section 24 of the Tenancy Act, 1948, of New Zealand: "(1) An order for the recovery of possession of any . . . urban

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* *Present*: VISCOUNT SIMONDS, LORD OAKSEY, LORD TUCKER, LORD COHEN and LORD SOMERVELL OF HARROW.

"property . . . may . . . be made on one or more of the grounds "following . . . (*h*) . . . that the premises are reasonably required "by the landlord . . . for his . . . own occupation. . . . (*m*) That "the premises are reasonably required by the landlord for "demolition or reconstruction." Where (in the circumstances of the present case) a year's notice to quit has been given under section 25 of the Act an order may be made under section 24 (1) (*h*) although the landlord does not offer alternative accommodation to the tenant, whereas paragraph (*m*) is available to the landlord only if he offers suitable alternative accommodation.

An hotel, of which the appellants had been lessees since 1926, was bought with other adjoining premises in 1941 by the respondents, who intended to demolish the hotel and build a garage for the purposes of their own business. The appellants continued in occupation of the premises under a lease of August 29, 1944, until on September 28, 1951, the respondents served on them a year's notice to quit under section 25 of the Tenancy Act, and in 1953 instituted the present proceedings claiming possession of the premises on the ground specified in section 24 (1) (*h*)—that they required the premises for their own occupation. They made no offer of alternative accommodation. The appellants contended that "the premises" in paragraph (*h*) meant the subject-matter of the lease, that that included the hotel, and that there must therefore be an intention to occupy the hotel in order to satisfy paragraph (*h*) and that intention was absent:—

Held, that in both paragraphs (*h*) and (*m*) of section 24 (1) of the Tenancy Act the word "premises" meant the subject-matter of the lease, but that the landlord nevertheless required the premises "for his own occupation" although he was intending for the purposes of his occupation to make substantial alterations or to put up a wholly new building. The respondents were accordingly entitled to possession. The scope of paragraph (*m*) was limited by paragraph (*h*) to cases where the landlord required the premises for demolition or reconstruction with a view to letting or selling them or making some use of them other than for his own occupation.

Obiter dicta of Williams J. in *Burling* v. *Chas. Steele & Co. Pty. Ltd.* (1948) 76 C.L.R. 485 applied.

Judgment of the Court of Appeal of New Zealand [1955] N.Z. L.R. 832 affirmed.

Appeal (No. 44 of 1955) from a judgment of the Court of Appeal of New Zealand (Gresson, Hay and Turner JJ.) (December 8, 1954), dismissing an appeal from an order of the Supreme Court of New Zealand (Cooke J.) (December 4, 1953), under which the appellants had to give to the respondents possession of premises known as the Rangitikei Private Hotel in the City of Palmerston North.

The following facts and statutory provisions are taken from the judgment of the Judicial Committee. The appellants had been lessees of the premises since 1926. In 1941 the respondents bought with other adjoining property the reversion of the premises intending to demolish the hotel and build a garage for the purposes of their own business as soon as they could get possession and obtain the necessary licences.

The appellants' lease expired in 1944. By an agreement dated August 29, 1944, the respondents granted to the appellants a new lease for one year from August 1, 1944. The appellants continued in occupation on the terms of that lease. The provisions of the Tenancy Act, 1948 (No. 76), as amended, on which the present appeal depended, were as follows:

Section 2. Interpretation. In this Act unless the context otherwise requires—" 'Dwelling-house' means any building or "part of a building let as a separate dwelling; and includes any "furniture or other chattels that may be let therewith; and also "includes any land, outbuildings, or parts of buildings included "in the tenancy; but does not include—(*a*) Any licensed "premises; or (*b*) Any premises that include more than three "acres of land where the tenant's income or a substantial part "thereof is derived from the use of that land for agricultural "purposes:

" 'Licensed premises' has the same meaning as in the "Licensing Act, 1908:

" 'Property' or 'urban property' means any land or interest "in land or any building or part of a building let for any "purposes under a separate tenancy; and includes any chattels "that may be let therewith; but does not include—(*a*) Any "dwelling-house; or (*b*) Any property that is used exclusively or "principally for agricultural purposes; or (*c*) Any premises in "respect of which a publican's licence, an accommodation licence, "or a tourist house licence is in force under the Licensing Act, "1908, or any hotel maintained by a Licensing Trust constituted "under any Act."

"Section 24.—Limiting grounds for recovery of possession.—

"(1) An order for the recovery of possession of any dwelling-"house or urban property, or for the ejectment of the tenant "therefrom, may, subject to the provisions of this part of this "Act, be made on one or more of the grounds following, but shall "not be made on any other ground:—(*a*) That the tenant has "failed to pay the rent lawfully payable in respect of the "premises, or has failed to perform or comply with any other "conditions of the tenancy: . . . (*g*) In the case of a dwelling-"house, that the premises are reasonably required by the "landlord or by one or more of several joint landlords for his or "their own occupation as a dwelling-house: (*h*) In the case of "an urban property, that the premises are reasonably required "by the landlord or by one or more of several joint landlords "for his or their own occupation: . . . (*m*) That the premises "are reasonably required by the landlord for demolition or "reconstruction: . . .

"(2) On the hearing by any court of any application for an "order to which the last preceding subsection relates, the court "shall take into consideration the hardship that would be caused "to the tenant or any other person by the grant of the application "and the hardship that would be caused to the landlord or any "other person by the refusal of the application, and all other "relevant matters; and may in its discretion refuse the application, notwithstanding that any one or more of the grounds "mentioned in subsection one of this section may have been "established."

The effect of section 25 on the present proceedings may be summarized as follows. If a year's notice to quit had been given then an order might be made under section 24 (*h*) although the landlord did not offer alternative accommodation. The court had still to apply section 24 (2). To succeed under paragraph (*m*) there must be an offer of alternative accommodation and there was no such offer in the present case.

In 1949 the respondents sought an order for possession with a view to demolishing the hotel and building the garage. The respondents, among other grounds, submitted that in the circumstances as stated the premises were required for their own occupation under section 24 (1) (*h*). Hutchison J., before whom the case came, held that a landlord could not require premises for his own occupation within paragraph (*h*) if his intention was to demolish the existing building. In other words, a landlord who intended to demolish must proceed under paragraph (*m*) although he intended himself to occupy after demolition and reconstruction. No order for possession was made and the appellants continued in occupation (*Porter Motors Ltd.* v. *McKenna*[1]).

On September 28, 1951, the respondents served on the appellants the year's notice under section 25 referred to above. Apart from that fact, the events prior to the present proceedings, which began in 1953, were not relevant. By their statement of claim the respondents claimed possession on three grounds, only one of which, namely, that based on paragraph (*h*), arose on this appeal.

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[1] [1950] N.Z.L.R. 8.

The appellants submitted that the "premises" meant the subject-matter of the lease and that in the present case that included the hotel. There must therefore, it was contended, be an intention to occupy the hotel in order to satisfy paragraph (*h*) and that intention was absent.

1956. July 9, 10. *J. G. Le Quesne* for the appellants. The Tenancy Act of New Zealand sets out a number of grounds on which possession of premises can be recovered, in particular paragraphs (*h*) and (*m*) of section 24 (1), and it is important to note that (*m*) is only open to the landlord if other suitable alternative accommodation is available for the tenant, but that in certain circumstances, which are present in this case, that limitation does not apply to paragraph (*h*). The respondents wanted possession of the premises in order to knock down the hotel and build in its place a garage. There can therefore be no doubt that the premises are reasonably required by them for demolition or reconstruction, but, unfortunately for the respondents, that does not avail them because there is no alternative accommodation; therefore, they say, but we also require them for our own occupation. Both courts below were against the appellants, but it is submitted that Hutchison J. in the earlier case of *Porter Motors Ltd.* v. *McKenna*[2] was correct when he said that a landlord could not require premises for his own occupation within paragraph (*h*) if his intention was to demolish the existing building.

The vital issue is the meaning of the words "the premises" in paragraph (*h*). Their ordinary meaning is, that which is covered by the habendum in the lease. Therefore a landlord who may require the land but not the building covered by the demise does not require "the premises." Those words are not defined in the Act or in an Interpretation Act. It appears from a number of provisions that throughout the Act the words "the premises" are used as a way of referring to that which is covered by the particular demise, be it dwelling-house or property, and whichever of those two it is, the words are used as covering the whole subject-matter of the demise: ss. 2, 8 (1), 10 (1), 26 (1) and 43. "The premises" of which occupation must be required includes here the hotel. "Occupation" has in it the meaning of using the building, and one cannot be said to be occupying it in any way if one is simply knocking it down. The respondents must

[2] [1950] N.Z.L.R. 8.

occupy that which the appellants occupied—the hotel—and in this case they had no intention of doing any such thing. What they want for their own occupation is something quite different. It is conceded here that there was never any intention to occupy the land with the buildings thereon—"the premises." As to "premises," see *Whitley* v. *Stumbles*[3]; the position for which the appellants are contending was in that case conceded. The test in each case must be, what is it that is let when the case comes before the court? Whatever that may be, then to bring himself within paragraph (*h*) the landlord must reasonably require to occupy that. One is then faced with the question, what is the meaning of "to occupy whatever it is that is let"? In *Burling* v. *Chas. Steele & Co. Pty. Ltd.*[4] Williams J. said: "As part of "such occupation he is quite entitled to do what he likes with "his own land, including reconstructing or demolishing the existing buildings." That view is contrary to the submission for the appellants here, but it was no more than the unconsidered opinion of the judge upon a matter which was not being decided by the court, and he was the only member of the court to deal with that point. The view he there expressed is not the correct view, at least of the New Zealand statute. The appeal should be allowed.

L. A. Blundell for the respondents. "Premises" are the land and the buildings on it. The whole question is whether within paragraph (*h*) the respondents require those premises for their own occupation. The first thing they are going to do is completely to demolish the buildings and reconstruct, and that, it is submitted, is a requiring of the premises for their own occupation if that is suitable for the type of occupation they will be carrying on. If the purpose for which the work is being done is putting the premises in a state suitable for occupation by the landlord, then the whole of that is occupation by the landlord and the requiring of the premises is within paragraph (*h*). That is merely restating what the Court of Appeal have said and what Williams J. said in *Burling's* case.[5] As the Court of Appeal said: "A landlord may . . . enter into occupation of premises intending "as part of his enjoyment thereof to demolish the buildings, and "substitute others therefor which he in turn will occupy: he is "occupying the premises if he occupies the land and such buildings as from time to time are situate thereon."

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[3] [1930] A.C. 544; 46 T.L.R. 555.

[4] (1948) 76 C.L.R. 485, 490.

[5] Ibid.

July 26. The judgment of their Lordships was delivered by Lord Somervell of Harrow, who stated the facts set out above and continued: A different conclusion from that arrived at by Hutchison J. in *Porter Motors Ltd.* v. *McKenna*[1] had been expressed obiter by Williams J. in the High Court of Australia in 1948 (*Burling* v. *Chas. Steele & Co. Pty. Ltd.*[2]). The case arose under the National Security (Landlord and Tenant) Regulations, which contained provisions similar to paragraphs (*h*) and (*m*), which were as follows: "(*g*) that the premises . . . (ii) not "being a dwelling-house—are reasonably required for occupation "by the lessor or by a person associated or connected with the "lessor in his trade, profession, calling or occupation . . . (*l*) that "the premises are reasonably required by the lessor for "reconstruction or demolition."

Williams J. said[3]: "This ground" (that is (*g*)) "applies "whenever the lessor requires the premises, which means the "land leased together with the buildings thereon, for his own "occupation or for a person associated or connected with him in "his trade, profession, calling or occupation. As part of such "occupation he is quite entitled to do what he likes with his "own land, including reconstructing or demolishing the existing "buildings. Ground (*l*) applies where the landlord requires the "premises for reconstruction or demolition with a view to letting "or selling them or making some use of them other than his "own occupation or the occupation of a person associated or "connected with him in his trade, profession, calling or "occupation."

It was common ground that the decision of Hutchison J.[4] did not create an estoppel. Cooke J., before whom the case came in the Supreme Court, held that the respondents reasonably required the premises for their own occupation, notwithstanding their intention to demolish the hotel. He then considered the matter under section 24 (2) and made an order for possession. His conclusion on this latter point was challenged unsuccessfully in the Court of Appeal but was not challenged before the Board.

In the Court of Appeal the judgment of the court was delivered by Turner J. After referring to *Burling's* case[5] Turner J. said this: "Alternatively, Mr. Hardie Boys argued that a "landlord cannot be said to require premises for his occupation "when he really intends to demolish the buildings which form a

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[1] [1950] N.Z.L.R. 8.
[2] (1948) 76 C.L.R. 485.
[3] Ibid. 490.
[4] [1950] N.Z.L.R. 8.
[5] 76 C.L.R. 485.

"part of those premises. He contended that occupation of the "premises meant occupation of each part of the premises, and "that this is inconsistent with an intention to demolish any "substantial part. We do not think that there is any inconsistency. It may be worth noticing that, while in the case of a "dwelling-house paragraph (*g*) provides that the premises must "be reasonably required by the landlord . . . for his occupation "as a *dwelling-house*, in paragraph (*h*), the corresponding "provision relating to urban property, there are no words "corresponding to those italicised. A landlord may, in our "opinion, enter into occupation of premises intending as part of "his enjoyment thereof to demolish the buildings, and substitute "others therefor which he in turn will occupy; he is occupying "the premises if he occupies the land and such buildings as from "time to time are situate thereon. In the case of urban "property, we do not find any words in the section which "conflict with this view."

After considering the points raised under section 24 (2) the court dismissed the appeal. The appellants submit that the "premises" means the subject-matter of the lease and in the present case that included the hotel. There must therefore, it is contended, be an intention to occupy the hotel in order to satisfy paragraph (*h*) and this intention is absent.

Their Lordships agree with the submission that both in paragraph (*h*) and in paragraph (*m*) the word "premises" means the subject-matter of the lease. In this respect they cannot accept the views of Cooke J. and the Court of Appeal. The demolition contemplated by paragraph (*m*) is demolition "on" and not "of" the premises. It is in the latter part of their submission that the appellants fail. The real question turns on the meaning of "his or their own occupation." Apart from paragraph (*m*) there would be no doubt that a landlord required demised premises for his own occupation although he was intending for the purposes of his occupation to make substantial alterations, or put up a wholly new building. The difficulty arises from the existence of paragraph (*m*). Is that to be construed as covering all demolition or reconstructions cases, including those where the landlord will remain in occupation, or do the words of paragraph (*h*) limit its operation in the way stated by Williams J.

Their Lordships are of opinion that its scope is so limited. This gives their natural meaning to the words "for his or their "own occupation" while leaving a scope for paragraph (*m*), which accords with the distinction plainly drawn by paragraphs

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(*g*) and (*h*) between landlords who require to relet or resell and landlords who require to occupy. This construction is supported by section 30, which provides, inter alia, that a landlord who within two years relets or resells premises of which he has obtained possession under paragraphs (*g*) or (*h*), shall be guilty of an offence. If the appellants' argument is right, one might have expected the demolition and reconstruction of a building within two years on premises of which possession had been so obtained also to have been made an offence.

Their Lordships will humbly advise Her Majesty that this appeal should be dismissed. The appellants will pay the respondent's costs.

Solicitors: *Coward, Chance & Co.; Wray, Smith, Paterson & Co.*

C. C.

[HOUSE OF LORDS.]

H. L. (E.)*

1956
Mar. 5, 6, 7, 8;
Apr. 19.

DAVIS CONTRACTORS LTD. . . . . APPELLANTS;

AND

FAREHAM URBAN DISTRICT COUNCIL . RESPONDENTS.

Building—Contract—Delay—Quantum meruit—Specified time for completion—Delay due to scarcity of labour—Neither party in fault—Work ultimately completed—Claim by contractors on a quantum meruit.

Building—Contract—Tender—Covering letter qualifying tender—Incorporation of tender in contract—Whether letter incorporated—Express incorporation of provision in letter.

Contract—Frustration. Quantum meruit.

On July 9, 1946, contractors entered into a building contract to build 78 houses for a local authority for a fixed sum within a period of eight months. They had attached to their form of tender a letter, dated March 18, 1946, stating that it was subject to adequate supplies of labour being available as and when required. Owing to unexpected circumstances, and without fault of either party, adequate supplies of labour were not available and the work took 22 months to complete. The contractors contended (1) that the contract price was subject to there being adequate supplies of labour available by reason of the letter of March 18, 1946; (2) that the contract was frustrated; and claimed to be entitled on a quantum meruit to a sum in excess of the contract price:—

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* *Present*: VISCOUNT SIMONDS, LORD MORTON OF HENRYTON, LORD REID, LORD RADCLIFFE and LORD SOMERVELL OF HARROW.

Held, (1) that the letter of March 18, 1946, was not incorporated in the contract.

(2) That the contract had not been frustrated. The fact that, without the fault of either party, there had been an unexpected turn of events, which rendered the contract more onerous than had been contemplated, was not a ground for relieving the contractors of the obligation which they had undertaken and allowing them to recover on the basis of a quantum meruit.

British Movietonews Ltd. v. *London and District Cinemas Ltd.* [1952] A.C. 166; [1951] 2 T.L.R. 571; [1951] 2 All E.R. 617 and *F. A. Tamplin Steamship Co. Ltd.* v. *Anglo-Mexican Petroleum Products Co. Ltd.* [1916] 2 A.C. 397; 32 T.L.R. 677 applied.

Bush v. *Whitehaven Port and Town Trustees* (1888) 2 Hudson's Building Contracts, 4th ed., 122 distinguished.

Decision of the Court of Appeal [1955] 1 Q.B. 302; [1955] 1 All E.R. 275 affirmed.

APPEAL from the Court of Appeal (Denning, Morris and Parker L.JJ.).

This was an appeal from an order of the Court of Appeal dated December 20, 1954, allowing an appeal by the respondents, Fareham Urban District Council, from an order of Lord Goddard C.J., dated May 18, 1954, on an award in the form of a special case signed and published on May 10, 1954, by an arbitrator, Mr. Lawson Scott-White, in an arbitration in which the appellants, Davis Contractors Ltd. (a firm of building contractors), were claimants. The respondents' appeal from the order of Lord Goddard C.J. had previously come before the Court of Appeal (Somervell, Birkett and Romer L.JJ.) on July 13 and 14, 1954, when the court ordered that the special case be referred back to the arbitrator so that he might make further findings of fact for the information of the court relevant to the application of *Bush* v. *Whitehaven Port and Town Trustees*,[1] and the contentions of the parties on that issue. Further findings were accordingly made by the arbitrator in the form of a supplemental award dated October 22, 1954.

The facts set out by Viscount Simonds and Lord Radcliffe were as follows: Early in 1946 the respondents, in contemplation of a building scheme, drew up bills of quantities and a form of tender which indicated the nature of their requirements, and invited inspection of their drawings, specifications and conditions of contract. Contractors wishing to tender for all or part of the projected work were to deliver their tenders on the form prescribed by March 19, 1946.

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[1] (1888) 2 Hudson's Building Contracts, 4th ed., 122.

On March 18 the appellants sent in a signed tender on the appropriate form undertaking the erection of (inter alia) 78 houses at Gudgeheath Lane, Fareham, in the county of Southampton, at a price of £92,425 and within the time limits specified. With it went a covering letter of the same date:

"Davis Contractors Limited
"325, Kilburn High Road,
"London, N.W.6
"18th March, 1946.

"RL/JEM
"Clerk of the Council,
"Fareham Urban District Council,
"Westbury Manor,
"Fareham,
"Hants.

"Dear Sir,

"*Re Gudgeheath Lane, Fareham.*

"We have pleasure in enclosing herewith our tender prepared "in accordance with your bills of quantities, and specifications "submitted by your engineer and surveyor for one hundred and "fifty two houses on four sites.

"Our tender is subject to adequate supplies of material and "labour being available as and when required to carry out the "work within the time specified.

"It is also based on the present published market prices of "materials delivered to site and existing established rates of "wages in the various trades for the district.

"Purchase tax has not been allowed for in our tender and "payment of such will form a nett addition to the contract's "sum. Also any variation in price of labour or materials will "form nett additions or omissions to or from the contract's sum, "as may be determined by calculation.

"We have based our price for facings on a p.c. amount of "20s. on the present quoted price for Fletton bricks delivered "Fareham station. This has been necessary as we have been "unable to get firm quotations for facings delivered to site.

"Thank you for this opportunity of serving you, and we assure "you always of our best attention.

"Yours faithfully,
"For and on behalf of
"Davis Contractors Ltd.
"(sd.) W. B. W. C. Curd.
"Director.
"Contracts Manager."

The form of tender which the respondents prescribed had appendix I attached to it, bearing the heading: "Materials and "goods to be purchased directly by the contractor in respect of "which variation of the contract sum is desired in accordance "with clause 68B of the conditions of contract." There was then a blank space left under two column headings "*Materials or* "*Goods*" and "*Basic Price.*" In this blank space the appellants had written the words, "As terms of letter attached dated "March 18, 1946, reference RL/JEM." There was nothing else in the appendix except a clause limiting to some extent the contractor's right to vary the contract sum in respect of price variations of materials and goods. Negotiations followed and between March 18 and the date when the formal agreement was entered into the appellants in fact supplied the respondents with a detailed schedule of prices, which was intended to constitute the list of materials and goods called for by appendix I, and was accepted. No further reference was apparently made to the letter of March 18.

The building contract was contained in a short agreement under seal dated July 9, 1946, and its main purpose was to identify several documents which had come into existence during or for the purpose of the preceding negotiations. It recited that "the "employer" (the respondents) ". . . has accepted a tender by the "contractors" (the appellants) "for the sum of £92,425 8s. 4d. "or such other sum as may become due under the contract also "having regard to the intended issue to the contractors of variation orders the effect of which it has been estimated by the "employer's engineer and surveyor will reduce the actual expenditure based on the rates submitted by the contractor to a sum "not exceeding £85,836 0s. 8d. for the construction, completion "and maintenance of such works."

By clause 2: "The following documents shall be deemed to "form and be read and construed as part of this agreement, viz.

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"(a) the said tender, (b) the drawings, (c) the general conditions "of contract, (d) the specification, (e) the bill of quantities, (f) the "schedule of rates and prices (if any)."

By the general conditions the appellants agreed to build 78 houses at Gudgeheath Lane within a period of eight months, completing 40 houses in six months and 70 houses in seven months. There was a penalty clause of £5 a week for every house uncompleted after the contract period.

The work started on June 20, 1946. For various reasons, the chief of them the lack of skilled labour, the work took, not eight but 22 months. The appellants were in due course paid the contract price which, together with stipulated increases and adjustments, amounted to £94,424. They contended, however, that owing to the long delay the contract price had ceased to be applicable, and that they were entitled to a payment on a quantum meruit basis.

The matter went to arbitration and the arbitrator in his award found as a fact (inter alia) that "appendix I was included in the "respondents' form of tender to enable contractors tendering for "work to make a list in that appendix of all materials or goods "which might be subject to a rise or fall in price so that both "parties to the contract would be protected from the effect of "fluctuation of prices due to causes outside their control."

The findings of fact continued: "(5) The site was handed to "the claimants [appellants] on June 20, 1946, and the work was "completed on May 14, 1948. (6) At the time of entering into the "said agreement the claimants and the respondents anticipated "that there would be available in the building industry a sufficient "labour force and a sufficient supply of materials to enable the "work specified in the agreement to be carried out substantially "within the time stipulated in the agreement. (7) The conditions "in which the work had to be carried out were different from "those anticipated by the claimants and the respondents in that: "(a) At all times there was a serious shortage of skilled labour "in the industry and the claimants were unable to obtain an "adequate supply of such skilled labour; (b) there was difficulty "in obtaining adequate supplies of bricks, timber and plumbers' "goods; (c) there was an adequate supply of unskilled labour in "the industry but not at all times within the locality of Fareham "where the claimants were required under the general conditions "of contract to recruit such labour unless the importation of "labour from elsewhere were specially sanctioned by the "respondents. (8) As a result of the said shortage of labour and "materials the claimants were unable to complete the work "within the time specified in the agreement and the respondents "accepted the position and allowed the work to continue until "finally completed on May 14, 1948, without serious objections "by the respondents. (9) As a result of the longer time taken "to complete the work the claimants incurred additional expense "and the actual cost to them of carrying out the contract was "£115,233 14s. 0d. The claimants have been paid by the "respondents the sum of £94,424 17s. 9d. (10) In April, 1949, "the claimants submitted to the respondents a claim for additional payment setting out in detail all items in respect of "which such claims were made. The additional cost and expense "were attributable in part to the circumstances set out in subparagraph (7) hereof over which the claimants had no control "and which resulted in wastage due to an unbalanced labour "force, the use of unskilled labour for semi-skilled work, the "retention, with the consent of the respondents, of unskilled "labour during slack periods, occasional stoppages due to shortage "of materials, an exceptionally long period of frost during the "winter of 1946–47 and excessively muddy conditions in the site "during November and December, 1946, and after the frost in "1947. In part the cost was incurred as a result of matters for "which the claimants were themselves to blame. . . ."

The arbitrator found that the additional cost and expense properly and unavoidably incurred by the appellants amounted to £17,651 13s. 1d. (This amount was subsequently slightly reduced.)

The arbitrator set out the contentions of the appellants as follows: "(1) That the letter of March 18, 1946, became a term "and condition of the contract. (2) That in any event the "contract was entered into on the basis that adequate supplies "of labour and materials would be available at the times required. "(3) That because adequate supplies of labour and materials were "not available the footing of the contract was removed and the "claimants were entitled to be paid on the basis of a quantum "meruit."

The arbitrator stated the questions of law which he was requested to state for the decision of the court: "(a) Whether "the stipulation as to availability of labour and materials made "in the claimants' letter of March 18, 1946, became a term of "the contract. (b) Whether the claimants are entitled to be "paid any sum in excess of £94,424 17s. 9d. already paid them."

Upon the matter coming before the court, Lord Goddard C.J. was of the opinion that the letter of March 18, 1946, was incorporated in the contract, and upon that basis was further of opinion that there was an implied promise by the respondents to pay a further reasonable sum if the conditions of the letter were not satisfied. He referred to *Bush* v. *Whitehaven Port and Town Trustees*,[1] but observed: "I do not think it is necessary to go "as far as that because I do not think that it is a destruction of "the whole foundation of the contract."

An appeal was taken to the Court of Appeal. Upon the question of the letter of March 18 being incorporated in the contract, the court, though no order to that effect was drawn up, expressed a view adverse to the appellants, but upon the alternative ground of claim, thinking that the findings of the arbitrator were inadequate, referred the case back to him with this direction: "that the said arbitrator may make further findings of fact for "the information of this court relevant to the application of the "principle in the case of *Bush* v. *Whitehaven Port and Town* "*Trustees*,[1] and the contentions of the parties on this issue. The "arbitrator to state his own conclusions on the contentions of "the parties if he intends his award to be a final award."

The arbitrator in his supplemental award dated October 22, 1954, stated the contentions of the appellants, which repeated their previous contentions. The contentions of the respondents included the following: "(4) That in any event the footing on "which the contract was agreed was not so changed that the "contract could be declared or treated as void or the claimants "be entitled to payment on a quantum meruit. (5) That any "claim on a quantum meruit basis was precluded by reason of "the conduct of the parties after a claim for additional payment "was first intimated by the claimants. That the respondents "so far from allowing the claimants to continue to work on a "different basis consistently maintained that the contract was "still applicable."

The arbitrator then stated the questions of law for the opinion of the court: "(1) Whether the stipulation as to the availability "of labour and materials made in the claimants' letter of March "18, 1946, became a term of the contract. (2) Whether the "claimants are entitled to be paid any sum in excess of the "£94,424 17s. 9d. already paid to them, namely, on a quantum "meruit, by reason of (a) the footing upon which the contract "was made having been so changed in the course of its execution

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[1] 2 Hudson's Building Contracts, 4th ed., 122.

"that its provisions no longer applied, or (b) an implied term "in the contract that it ceases to bind in the circumstances as "found. (3) Whether if the claimants became entitled to be "paid any sum in excess of that already paid to them by the "respondents such a claim was barred by the conduct of the "parties. . . ."

The arbitrator's findings on the contention relating to *Bush* v. *Whitehaven Port and Town Trustees* [1] were that both parties entered into the contract on the basis that adequate supplies of labour and material would be available at the times required, that such supplies were not so available, and that, as the duration of the work was unavoidably extended from a period of eight months to one of 22 months, the footing of the contract was removed. He further set out reasons for finding that "the footing of the "contract was so changed that it became void and the claimants "are entitled to a fair and reasonable price for the work they "have done." As to the conduct of the parties, the arbitrator found that claims were made by the appellants 10 months after the start of the work, that they were not admitted by the respondents and that the appellants continued to press them. Giving effect to his own conclusions, the arbitrator found that the appellants were entitled to be paid a further sum of £17,258 13s. 1d.

The Court of Appeal held that the letter of March 18, 1946, was not incorporated in the contract and, further, that the contract was not frustrated.

Charles Russell Q.C. and *J. Stuart Daniel* for the appellant company. The points of law are (1) (a) whether the letter of March 18, 1946, was incorporated in the contract, and (b), if so, whether its effect was to enable the appellants to claim a quantum meruit or only to save them from penalties for delay caused by inadequate labour supplies; and (2) alternatively, whether this was a case of frustration. There is no distinction between *Bush* v. *Whitehaven Port and Town Trustees* [1] and the general cases of frustration. The question here is whether the appellants, having built houses on the respondents' land, in the absence of a contract fixing the price (because the contract entered into was frustrated) were entitled to a quantum meruit. If the circumstances, as they turned out, were in a fundamental respect different from those which were envisaged so as to make the project not the project for which they had contracted, frustration can be asserted.

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[1] 2 Hudson's Building Contracts, 4th ed., 122.

Suppose, in the case of a contract for work, one side said to the other: "There is no frustration and you are bound by the "contract," while the other side said: "There is frustration "and I am continuing the work only on the basis that there is "frustration," but both sides said: "At all events, let us get "the work done." In the end the case would come down to a pure question of whether or not there was frustration. The quantum meruit would be implied. If, without any contract for the construction of buildings, someone erected buildings on a landowner's land, with his knowledge and consent, in circumstances in which it was plain to both parties that the work was not done gratuitously, the law would imply an agreement to pay a reasonable and fair sum.

In the present case the appellants had no right to insist on going on with the work, but if they did go on with the respondents' assent it was only on terms that they were paid a fair amount and not the contract price. The respondents contended that they could not get more than the contract price because the contract still bound them. Once there was frustration the whole contract had gone and the respondents could have ordered the appellants off the site.

Logically the first question is whether the letter of March 18, 1946, was incorporated in the contract. Clause 2 (a) of the agreement refers to "the said tender" and the letter was referred to on the only form of tender sent in by the appellants. The offer in the tender plainly included the qualification in the letter. The tender referred to in the agreement was an offer which embodied and never lost the qualification in the second paragraph of the letter. The "tender" referred to in the recital and in clause 2 was the same thing. The letter said: "Our tender is subject "to . . ." The letter meant: "That which I enclose is the "tender and this is the condition which I attach to the tender, "which is the other paper."

As to the question what was the effect of the letter, if it was incorporated, if the appellants had been directing their minds to the penalty clause, it would have been easy for them to say: "If "there is delay due to inadequate labour or supplies, we are not "to be subject to a penalty." Price was the leading feature in tendering for the contract and to this the reservation in the letter was directed, since time was vital to the costings and therefore to the price. Inadequate labour and materials would run the appellants over the time specified and there is reference to the tender and the time specified because the time affects the price.

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Every part of the letter relates in some way to the price. One effect of this condition might be to substitute by contract an obligation to go on and do everything, a fair price being paid. The other might be that the contract should go off, as a technical matter, just as if there had been frustration, leaving either party free to go on or resile from it, subject to payment of a fair price for whatever work was actually done. The literal meaning of "our tender" in paragraph 2 of the agreement is "our offer to "construct the houses at the price named and within the time "specified." There is no justification for departing from the ordinary and prima facie meaning of the language.

On the alternative point of frustration, this is a case in which the contract has gone, because it was entered into on a particular footing which has disappeared, with the result that the project became commercially a totally different project.

This is a mixed question of fact and law and therefore reviewable, though a court would only rarely upset an arbitrator of this character in his conclusions. Frustration, though it depends very largely on the facts and their impact on the relationship between the parties, is partly a question of law. One must consider the matter from the point of view of the construction of the contract in the surrounding circumstances, having regard to the nature of the contract and to the supervening facts.

The relevant cases are *Bush* v. *Whitehaven Port and Town Trustees*[1]; *Jackson* v. *Union Marine Insurance Co. Ltd.*[2]; *Metropolitan Water Board* v. *Dick, Kerr & Co. Ltd.*[3]; *New Zealand Shipping Co. Ltd.* v. *Société des Ateliers et Chantiers de France*[4]; *Maritime National Fish Ltd.* v. *Ocean Trawlers Ltd.*[5]; *Sir Lindsay Parkinson & Co. Ltd.* v. *Commissioners of Works*[6]; *Jennings & Chapman Ltd.* v. *Woodman, Matthews & Co.*[7]; *Brewer Street Investments Ltd.* v. *Barclays Woollen Co. Ltd.*[8]; *F. A. Tamplin Steamship Co. Ltd.* v. *Anglo-Mexican Petroleum Products Co. Ltd.*[9]; *Bank Line Ltd.* v. *Arthur Capel & Co.*[10]; *Joseph Constantine Steamship Line Ltd.* v. *Imperial Smelting Corporation*

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[1] 2 Hudson's Building Contracts, 4th ed., 122.

[2] (1873) L.R. 8 C.P. 572; (1874) L.R. 10 C.P. 125, 140–141.

[3] [1918] A.C. 119, 138–139; 34 T.L.R. 113.

[4] [1919] A.C. 1; 34 T.L.R. 400.

[5] [1935] A.C. 524.

[6] [1949] 2 K.B. 632, 657, 659–660, 665–666, 667–668; [1950] 1 All E.R. 208.

[7] [1952] 2 T.L.R. 409, 410.

[8] [1954] 1 Q.B. 428; [1953] 2 All E.R. 1330.

[9] [1916] 2 A.C. 397, 403, 404–405; 32 T.L.R. 451.

[10] [1919] A.C. 435, 442, 450–451, 454–455, 458–459; 35 T.L.R. 150.

Ltd.[11]; *Denny, Mott & Dickson Ltd.* v. *James B. Fraser & Co. Ltd.*[12]; *Larrinaga & Co.* v. *Société Franco-Américaine des Phosphates de Medulla*[13]; *Federal Steam Navigation Co. Ltd.* v. *Dixon & Co. Ltd.*[14]; *Hangkam Kwingtong Woo* v. *Liu Lan Fong*[15]; *British Movietonews Ltd.* v. *London and District Cinemas Ltd.*[16]

There is no case which lays down that in considering whether or not there has been frustration of a contract the circumstances surrounding the making of it, which may be taken into consideration, are wider than those which are taken into consideration for the ordinary purposes of construing a contract. In a case of this character there must be a degree of delay at which it is right to say: "On a fair construction, this is no longer within the contract." In this case the basis or footing of the contract has gone in the fundamental sense. There must be some stage at which prolongation of the time produces frustration. It is a very drastic step to say, in disagreement with a skilled arbitrator, that the period of delay was not long enough. A delay of such a character as to make the project commercially quite different is not within the delay clause of the contract. Frustration is almost entirely a question of degree and fact and there should be very good reasons, which are not present here, for differing from the conclusion of an arbitrator experienced in this field. There was justification for the decision of the arbitrator and no justification for reversing him.

J. Stuart Daniel following. As to the question whether there can be an inquiry ex post facto whether frustration has occurred, the work having gone on meanwhile, that is precisely what happened in *Bush* v. *Whitehaven Port and Town Trustees*[17] and in *Parkinson's* case.[18] In both work continued, one party saying that it had been continued under a contract and the other that it had not, and the issue was determined by the court after the event. Here early during the period of delay, though after the contract period had expired, the appellants were putting forward claims which were quite inconsistent with the contract being binding on them.

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[11] [1942] A.C. 154, 163–164, 172, 186–187; 57 T.L.R. 485; [1941] 2 All E.R. 165.

[12] [1944] A.C. 265, 273–274, 281; 60 T.L.R. 419; [1944] 1 All E.R. 678.

[13] (1923) 92 L.J.K.B. 455, 463; 39 T.L.R. 316.

[14] (1919) 1 Ll.L.Rep. 63.

[15] [1951] A.C. 707, 722; [1951] 2 T.L.R. 442; [1951] 2 All E.R. 567.

[16] [1952] A.C. 166, 181–183, 184, 185–186, 186–187; [1951] 2 T.L.R. 571; [1951] 2 All E.R. 617.

[17] 2 Hudson's Building Contracts, 4th ed., 122.

[18] [1949] 2 K.B. 632.

When frustration occurs it does so automatically and nothing which the parties say or think or do, short of entering into a new contract, can affect the position: see *Joseph Constantine Steamship Line Ltd.* v. *Imperial Smelting Corporation Ltd.*[19] and *Denny, Mott & Dickson Ltd.* v. *James B. Fraser & Co. Ltd.*[20] If frustration has occurred it makes no difference that the work has gone on, because if the parties chose to go on with the work they went on under a different contract. For convenience the parties have gone on with the work and left it to be decided later, since they cannot agree, whether the work was done under the original contract, if there was no frustration, or under a new contract to be implied, if there was frustration.

Whether the principle underlying frustration is to be explained on the basis of an implied term or on the view that the foundation of the contract has gone, the question is one of construction. One must look at the contract to see what the parties intended in the events which supervened; one must construe it to see whether it was meant to apply to what happened. One can say that construction is a matter of law and the events which happened afterwards are a question of fact, but the data for the decisions on all the authorities are: (1) the express words of the contract; (2) its nature and subject-matter; (3) the surrounding circumstances in which it was made, and (4) the events as they turned out afterwards. The express terms of the contract are not of much help in a case like this and the true comparison is between the facts of the surrounding circumstances and the type and subject-matter of the contract, on the one hand, and the facts as they turned out, on the other. In the last analysis it is a comparison of fact and the arbitrator had the expert knowledge to help him in making that decision. Great weight should be given to his findings and they should only be overruled if the court considers that there was no possible justification for his conclusions.

Finance is vital to a building contract, and finance depends on time and time depends on labour. All these matters are vital to this kind of contract. If the contract time is multiplied virtually by three, as happened here, the point where frustration occurs must have been passed: see *Metropolitan Water Board* v. *Dick, Kerr & Co. Ltd.*[21] It does not matter when frustration occurred since, in any view, the point must have been passed.

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[19] [1942] A.C. 154, 187–188.

[20] [1944] A.C. 265, 274–275.

[21] [1918] A.C. 118, 126.

As to the letter of March 18, 1946, so far as the construction of the second paragraph is concerned, the proper and full meaning of " tender " is the offer to carry out the work at the price and in the time specified and in accordance with all the other conditions of the offer; it is the offer as a whole. Any other construction cuts down the full meaning and selects some particular aspect of it. If the full meaning of " tender " in the letter is to be cut down and one particular aspect is to be selected, that aspect should be price, because this is a contractor's and not a lawyer's letter. The writer's mind was clearly on price. If he had had penalties in mind there was no reason why he should not have said so. There is no reason for departing from the normal businesslike construction of the second paragraph of the letter as making the whole offer, but with particular emphasis on the element of price, subject to the contractors being able to complete on time.

[Viscount Simonds intimated that their Lordships did not wish to hear argument on behalf of the respondents as to whether or not the letter of March 18, 1946, was incorporated in the contract but that they did wish to hear argument on the frustration point.]

H. J. Phillimore Q.C., *Stephen Chapman Q.C.* and *M. Stuart-Smith* for the respondents. If this is a case of frustration, it is a very strange one. The contract was never interrupted. It started. It continued consistently until the work was completed. From first to last it was never suggested that it had been frustrated. Both the parties were experienced. Admittedly the contractors were claiming to be paid more, but they were claiming under the contract, asking for an addition to the contract. If one is considering what the reasonable local authority or the reasonable builder would have said in the circumstances, the fact that the parties never raised the question of frustration is of some value in evidence. The contractors went on with the work, accepting all the other conditions of the contract but saying that, in the circumstances, they should have some more money. They never suggested that the contract was at an end and that, in view of what had happened, they were entitled to go off the site unless they were paid more.

Apart from *Bush's* case [22] there is no case where frustration has been alleged as being due to delay, unless there has been an interruption or some catastrophic event. The facts of that case are not very well reported.

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[22] 2 Hudson's Building Contracts, 4th ed., 122.

If there was frustration in the present case, when did it occur? It will not do to say that that does not matter. It is important to be able to say at what point frustration occurs because the parties must be able to discover what their rights are. In a contract like this, when the work proceeds consistently and without interruption, it is impossible to say that at any point frustration has occurred: see *British Movietonews Ltd.* v. *London and District Cinemas Ltd.*[23] and *Larrinaga & Co.* v. *Société Franco-Américaine des Phosphates de Medulla.*[24] Much of what Lord Sumner said in the latter case applies to every building contract. The building contractor takes the risk whether he can do the work more quickly than the contract stipulates, or more cheaply, or whether some variation in the labour market or some other difficulty may cause the contract to run over the time. If one was seeking by the doctrine of frustration to introduce certainty into building contracts one would not do so by applying it to a case of this sort, because then nobody would ever know whether or not a contract had been frustrated. When all that has happened is that the contract has taken rather longer than was expected because one or both of the parties misjudged the availability of labour and materials, then, if that were held to amount to frustration, it would justify interference with almost any commercial contract. The letter of March 18, 1946, shows that the contractors were contemplating the risk of a more than normal delay.

The points on which the respondents rely are: (1) This would be a very strange case of frustration, because (a) there was no catastrophic or disruptive event; (b) the work went on without interruption throughout the whole period and was actually completed, and (c) because the contractors' case is that the circumstances never changed in that the situation with regard to labour and materials, instead of improving, remained substantially as it was at the time the contract was entered into. (2) The whole point and essence of the doctrine of frustration is that the parties should be able to discover at a given point of time whether or not the contract has been frustrated. One should not import the doctrine into the circumstances of a commercial contract in the absence of some catastrophic or disruptive event. (3) If the present is a case of frustration, a builder who enters into a lump sum contract with provision for certain increases may complete the work and yet say: "This has cost me a great deal more than "I ever anticipated and, of course, we both thought that the

[23] [1952] A.C. 166, 185.

[24] 92 L.J.K.B. 455, 464–465.

"work could be done in the time in which I promised it." He can then put on to the building owner an enormous increase of price. But what happened here was that the contractors gambled on the availability of labour in somewhat abnormal conditions. The whole point of entering into a contract in abnormal conditions is that you may make a very big profit. But, on the other hand, you may make a substantial loss. That is the gamble which the builder takes. It is far more difficult to import frustration in the case of a lump sum contract than in that of a measure and value contract.

The vital matter in a contract like this is price. The basis of the contract is that the building owner believes that he has got a builder who will discharge the responsibility which he has undertaken at the price which he has quoted. It is very hard to find the basis of a work and labour contract, far more difficult than in the case of a contract for an appearance at a music hall in which the existence of the music hall may fairly be said to be the basis. There is no ground for saying that the basis contemplated by both parties was material and labour to do the work in the time. Both the question of basis and that of frustration are matters of law for the court: see *In re Comptoir Commercial Anversois and Power, Son & Co.*[25]

As to *Bush* v. *Whitehaven Port and Town Trustees*,[26] what the plaintiff was given to understand, as set out in the statement of facts,[27] might have amounted to a collateral warranty. On any other basis it is hard to see how the jury could have reached their first finding.[28] A collateral warranty is, strictly speaking, part of the contract. Lord Coleridge C.J.[29] relied on *Jackson* v. *Union Marine Insurance Co. Ltd.*,[30] where there was a completely disruptive event. But to apply his statement, made in relation to the facts of the case with which he was dealing, to a contract such as the present is to misuse his words. It is hard to extract a principle from a case which was apparently decided by the jury as an ordinary breach of contract but which the courts then went on to decide as one of frustration.

The arbitrator does not show any findings of fact to justify his conclusion of law. The contract went on and the work was completed, despite the shortages and difficulties referred to in the award. That is quite insufficient to justify a finding of frustration, because there was no disruptive event, no catastrophe, nothing which rendered the project impossible or even commercially impracticable.

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[25] [1920] 1 K.B. 868, 874–875, 877, 881–882, 890, 893–894, 898–900; 36 T.L.R. 101.

[26] 2 Hudson's Building Contracts, 4th ed., 122.

[27] Ibid. 123.

[28] Ibid. 124.

[29] Ibid. 128.

[30] L.R. 8 C.P. 572; L.R. 10 C.P. 125.

The true ratio decidendi of *Bush's* case [31] was that it was neither fair nor honest nor reasonable to hold otherwise than the court did.

Charles Russell Q.C. in reply. The letter of March 18, 1946, not being incorporated in the contract, cannot be used against the contractors to attack the finding in their favour on the general principle of *Bush's* case.[31]

It was suggested for the respondents that the contractors did not claim that there was frustration. But the claim of the contractors was against the contract being binding as distinct from a plea in mercy, even though, being laymen, they did not use the magic word "frustration."

The non-availability of labour and materials turned an eight months' contract into a 22 months' contract. There is no magic of precision in the word "catastrophe." When people use it in the sense of frustration they mean something which is so different from what the parties could have contemplated that the project is totally different. As to the meaning of a catastrophic "event," the "event" need not be positive. The non-availability of a great number of men who are together essential is an event and their continued absence may lead to frustration. The words "interruption" or "disruption" do not necessarily involve the total cessation of all work on the particular project. A positive government intervention forbidding the use of the full required corps of workers on a particular job would be an event capable of producing frustration. So would a negative government failure to produce the full corps of workmen. Throughout the authorities phrases are used in relation to frustration which do not necessarily refer to some event, either negative or positive. In *Parkinson's* case [32] Asquith L.J. said that many frustration cases involve a catastrophic event; therefore, in his view, all did not. In principle there is no justification for saying that there cannot be frustration in a case like this. If in this case a stage had been reached in which the informed business man's estimate was that, because of labour shortage, the work would take five years, with overheads running and an unbalanced labour force adding to the contractors' expenses, the contract would not bind them to what was a totally different project and commercial men would recognize that there had been frustration. If the time of a project was extended from eight years to 22 years (the same proportion as here), owing to shortage of labour and materials, it would obviously be a totally different project. The difficulty that it is hard to see at any particular time whether or not there is frustration is inherent in almost all frustration cases.

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[31] 2 Hudson's Building Contracts, 4th ed., 122.

[32] [1949] 2 Q.B. 623, 665.

Even ignoring the possible precedents of *Bush's* case[33] and *Parkinson's* case,[34] there is no justification for saying quite generally that in this type of contract there can be no frustration because there is lacking a catastrophic event. It was unnecessary for the arbitrator to decide on a date by which the contract had become frustrated. The appellants are not saying that a date could not have been fixed.

The behaviour of the parties is not a material factor to be taken into account. The fact that the contractors made a claim against the contract being a continuing contract has been referred to only as a shield. It cannot be evidence as to whether or not there was frustration. So too there is no evidential weight in the fact that the contractors went on doing the work, either against them or in their favour.

To say that one can only logically have frustration if favourable circumstances exist before the contract and they become unfavourable during the contract is to beg the whole question of principle.

This is not a case in which the contractors went on contentedly for a little over the time and then said: "Though we have worked "under your contract you ought to pay us more." Nor is it a case in which in abnormal times a builder gambled in speculation of a big profit and it did not come off. In building contracts the margin of profit is in the order of five per cent.

The arbitrator's finding that availability of labour to complete the work within eight months was a basic footing is justified.

In re Comptoir Commercial Anversois and Power, Son & Co.[35] has no particular application to this case. *Bush's* case[36] was rightly decided as a frustration case and is sound in principle.

Their Lordships took time for consideration.

April 19. Viscount Simonds. My Lords, the appellants put their claims on alternative grounds, (a) that the contract price was subject to an express overriding condition contained in a letter of March 18, 1946, that there should be adequate supplies of labour and material, and (b) that the contract had been entered into on the footing that adequate supplies of labour and material would be available to complete the work within eight months, but, contrary to the expectation of both parties, there was not sufficient skilled labour and the work took 22 months, and that this delay amounted to frustration of the contract. It was conceded by the respondents that, if the contract was frustrated as alleged, the appellants were entitled to a further sum upon the basis of a quantum meruit. With this aspect of the case, which might have presented some difficulty, your Lordships will not be troubled. These two grounds of claim have persisted through the long course of these proceedings, which have included a prolonged hearing before an arbitrator, an award in the form of a special case, a hearing of the case by the Lord Chief Justice, an appeal to the Court of Appeal, a reference back to the arbitrator, a supplemental award by him, a further hearing by the Court of Appeal, and an order of that court rejecting the appellants' claim.

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[33] 2 Hudson's Building Contracts, 4th ed., 122.

[34] [1949] 2 K.B. 623.

[35] [1920] 1 K.B. 868.

[36] 2 Hudson's Building Contracts, 4th ed., 122.

My Lords, with the first ground of claim I will deal very briefly. I am in full agreement with the opinion of Parker L.J. on this part of the case, which will be elaborated by my noble and learned friend, Lord Radcliffe. The appellants' letter of March 18, 1946, to which I have referred, was a covering letter in which, while enclosing their tender prepared in accordance with the respondents' bills of quantities and specifications, they made a number of statements about the basis of that tender. The material statement was as follows: "Our tender is subject "to adequate supplies of material and labour being available "as and when required to carry out the work within the time "specified." It is possible that, if this letter had been followed by an immediate acceptance, the parties must have been deemed to enter into a contract which contained some such term, though its precise content and effect would have been extremely difficult to define. But that is not what took place nor what might be expected to take place. On the contrary, there were negotiations following the tender and these resulted in the formal agreement of July 6, which did not incorporate the letter of March 18. It would, as it appears to me, be contrary to all practice and precedent to hark back to a single term of preceding negotiations after a formal and final agreement omitting that term has been signed. The reference to the letter in an appendix to the tender is clearly confined to the matter with which that appendix dealt, namely, the so-called "escalator" clause of the conditions of contract.

The second ground of claim demands more serious consideration, not because it has any intrinsic merit but because it has acquired from the course of the proceedings a certain specious validity.

[His Lordship recited the findings of the arbitrator and the direction of the Court of Appeal on the first hearing there and continued:] My Lords, I do not find it easy to interpret this direction. The case of *Bush* v. *Whitehaven Port and Town Trustees*,[1] which is reported only in Hudson on Building Contracts, if it can be said to embody any principle, illustrates an early stage in the development of the doctrine of frustration which has since been the subject of many decisions in this House. And it was, I think, to this issue that the contentions of the parties and the further findings of the arbitrator were directed.

[His Lordship referred to the supplemental award and continued:] Now the matter came back to the Court of Appeal, which was not constituted as on the former occasion. The alternative grounds of claim were again fully argued. The first ground, that of the incorporation of the letter of March 18 in the contract, was rejected, either because it was held not to be incorporated or because, even if incorporated, it had not the effect for which the appellants contended. Upon this I will say no more.

The second ground of claim remains, and upon this the learned judges of the Court of Appeal were unanimously against the appellants and they were, in my opinion, clearly right. If the matter had in the first instance come before a court of law which, after finding the facts as found by the arbitrator, had then to consider the law applicable to those facts, there could only have been one answer. The Lord Chief Justice was, in my opinion, stating the obvious when he said in the passage that I have cited, "I "do not think it is destruction of the whole foundation of the "contract." The doctrine of frustration of a contract (for it is that doctrine and nothing else which must be invoked) has never been applied or, so far as I am aware, been sought to be applied to such a case unless, indeed, *Bush* v. *Whitehaven Port and Town Trustees*[1] was one. The contract was for completion of certain work in eight months: the contractors made their tender in the expectation that they would be able to do the work in the time and made a price accordingly. It may then be said that they made the contract on the "basis" or on the "footing" that their expectations would be fulfilled. Nor presumably were the expectations, or at least the hopes, of the respondents in any way different. Let it be said, then, of them, too, that they contracted upon the same basis or footing. But it by no means follows that disappointed expectations lead to frustrated contracts. I do not propose to revive the controversy about the juridical basis of the doctrine of frustration. If it rests on an implied term of the contract to the effect that the parties will not be bound if a certain event happens or does not happen, I can see no ground for saying that such a term must be implied in this contract. If it is permissible to judge by the event, it is clear that the parties would not have agreed on any such term. I pause to observe that it is not enough to say that in the event of something unexpected happening some term must be implied: it must be clear also what that term should be. In such a case as this I can see no reason for supposing that the parties would have agreed either at what moment the frustrating event was to be deemed to happen, or what was to be the position when it in fact happened. Equally, if, as is held by some, the true doctrine rests, not on an implied term of the contract between the parties, but on the impact of the law on a situation in which an unexpected event would make it unjust to hold parties to their bargain, I would emphasize that in this aspect the doctrine has been, and must be, kept within very narrow limits. No case has been cited in which it has been applied to circumstances in any way comparable to those of the present case. It is sufficient to ask when in the course of this twenty-two month contract that unexpected disruptive event happened which put an end to it. "Rights," said Lord Sumner in *Bank Line Ltd.* v. *Arthur Capel & Co.*,[2] "ought not to be left in suspense or to hang on the "chances of subsequent events." It is wholly inconsistent with this, as I think, fundamental condition that a building contractor should without intermission work upon his contract over a period which by much or little exceeds the contract time and at the end of it say, as the appellants say here, "A twenty-two month "project is not an eight month project," or less formidably, "An expenditure of £111,000 is not an expenditure of £94,000, "therefore the original contract must be regarded as frustrated "and for all the work that has been done we must be paid, not "the contract price but upon the basis of a quantum meruit." My Lords, I say it with all respect to the arguments of counsel,

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[1] (1888) 2 Hudson's Building Contracts, 4th ed., 122.

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[2] [1919] A.C. 435, 454; 35 T.L.R. 150.

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but it appears to me that that is to make nonsense of a doctrine which, used within its proper limits, serves a valuable purpose.

But, it was urged, this case cannot be regarded in the manner that I postulated. There are the findings of the arbitrator, a man experienced in the matter of building contracts, and they should not be set aside. I will say at once that the arbitrator has clearly done his work with great care and skill. But his findings involve a blend of law and fact and, deliberately using the words that he has chosen, "basis" and "footing," I can see no justification for a conclusion of law that the contract was frustrated.

It remains to say something about the case of *Bush* v. *Whitehaven Port and Town Trustees*[3] which has loomed so large in the earlier stages of this case and in the argument before this House. I must say for myself that I find it an extremely puzzling case and, if it had been a decision of this House and, therefore, binding on us, I should have felt grave difficulty about it. But two things may be said: first, that it is not binding on us; secondly, in so far as it is an authority on the law of frustration, for which purpose alone I conceive it to have been cited, it must be read in the light of the numerous decisions of higher authority which have since been given. I am not satisfied that it can be supported on the ground suggested by Denning L.J. nor, on the other hand, do I say that the decision is a wrong one. But I do emphatically say that it cannot, in the light of later authority, be used to support the proposition that where, without the default of either party, there has been an unexpected turn of events, which renders the contract more onerous than the parties had contemplated, that is by itself a ground for relieving a party of the obligation he has undertaken. I agree with the learned Lord Justice that that is the import of the decision of this House in *British Movietonews Ltd.* v. *London and District Cinemas Ltd.*,[4] and that it precisely covers this case.

I would dismiss this appeal with costs.

Lord Morton of Henryton. My Lords, two questions of law arise on this appeal: 1. Was the letter of March 18, 1946, from the appellants to the respondents, incorporated in the contract under seal which was entered into by the parties on July 9, 1946? 2. Was that contract frustrated, with the result that the appellants, who have erected 78 houses for the respondents, are not bound to accept the contract price, but are entitled to a further sum of over £17,000, which the arbitrator has awarded to them?

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[3] 2 Hudson's Building Contracts, 4th ed., 122.

[4] [1952] A.C. 166; [1951] 2 T.L.R. 571; [1951] 2 All E.R. 617.

My Lords, in my opinion, the letter of March 18, 1946, merely formed part of the negotiations between the parties which led up to the contract of July 9, and its terms were not incorporated into that contract. This matter is dealt with fully in the opinion which will be delivered by my noble and learned friend, Lord Radcliffe, and I am content to say that I agree with his reasoning and his conclusion.

I can state quite briefly my views on the second question, since I understand your Lordships are all of opinion, as I am, that the Court of Appeal reached the right conclusion. The appellants contracted to complete 40 houses within six months, 70 within seven months, and all the 78 houses within eight months. It is agreed that the work started on June 20, 1946, and should, therefore, have been completed in February, 1947. In fact, the progress of the work was delayed, because, as the arbitrator held, " adequate supplies of labour and materials were not available at " the times required." Nevertheless, the appellants went on with the work, without any actual interruption, and completed it in a period of 22 months. They now contend that the contract was frustrated, and they rely on certain findings by the arbitrator, which have already been read, and on the decision of the Court of Appeal in *Bush* v. *Whitehaven Port and Town Trustees.*[5]

My Lords, it is clear that the appellants are entitled to no more than the contract price, unless they can satisfy your Lordships that at some time the contract of July 9, 1946, came to an end, so that in continuing to erect houses they were no longer working under that contract. I am not so satisfied. I agree with the observation of Morris L.J. that[6]: " Though the basis or footing " of the contract was removed in the limited sense that the " anticipations of the parties were not realized, the facts found " do not require an implication in the contract that it was to " come to an end if those anticipations were not realized." It is, I think, impossible to hold that a contract has been frustrated unless it can be said: " As and from such and such a date, at " latest, the contract ceased to bind the parties."

In the course of the hearing counsel for the appellants were asked: " When do you say that the contract came to an end? ", and they replied that they were unable to specify any time. I think that this answer was correct and inevitable, but it reveals the inherent weakness of the appellants' case.

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[5] 2 Hudson's Building Contracts, 4th ed., 122.

[6] [1955] 1 Q.B. 302, 314–315; [1955] 1 All E.R. 275.

The facts in the case of *Bush* v. *Whitehaven Port and Town Trustees*[7] are very briefly stated in the report, but I think it is clear that the judgments of the Court of Appeal in that case were based upon the findings of the jury, and in particular the fifth finding. The question put to the jury was: "Were the "conditions of the contract so completely changed, in conse-"quence of the defendant's inability to hand over the sites of "the work as required, as to make the special provisions of the "contract inapplicable?", and the jury replied: "Yes." This question was, I think, a question of law, or at least of mixed fact and law, but the Court of Appeal accepted the jury's answer, and on that footing held that by October 8, 1886, when the contractors got possession of the required sites, the contract had ceased to exist. In my opinion, *Bush* v. *Whitehaven Port and Town Trustees*[7] was a decision upon very special facts, which enabled the court to find that, although the contractors finished the work specified in the contract, they were not working under the contract from October 8, 1886, onwards. For this reason the case does not, in my opinion, assist the appellants. I would add that, since the decision in the case just cited, the doctrine of frustration has frequently been considered in your Lordships' House, and for an authoritative exposition of the doctrine one should turn to the speeches in this House rather than to the judgments of the Court of Appeal in *Bush* v. *Whitehaven Port and Town Trustees*.[7]

I would dismiss the appeal.

LORD REID. My Lords, the arbitrator has found in his supplementary award that "the footing of the contract was removed," and his reason for so finding is that "both parties entered into "the contract on the basis that adequate supplies of labour "and materials would be available at the times required," but that adequate supplies were not available, with the result that the duration of the work was unavoidably extended from eight months to 22 months. It seems clear that he has used the words "footing" and "basis" because the special case was referred back to him for further findings of fact relevant to the application of the principle in the case of *Bush* v. *Whitehaven Port and Town Trustees*,[7] and the contentions of the parties on this issue, and the parties used these words in their contentions.

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[7] 2 Hudson's Building Contracts, 4th ed., 122.

The appellants' submissions, as stated in the award, are almost identical with the arbitrator's findings, and the respondents' submission is that the footing on which the contract was agreed was not so changed that the contract could be treated as void. This form of award gives rise to considerable difficulty. But I have some sympathy with the arbitrator: he may have found as much difficulty as I have in discovering "the principle in the case of "*Bush* v. *Whitehaven Port and Town Trustees.*[7]"

In order to determine how far the arbitrator's findings are findings of law and therefore subject to review, I think it is necessary to consider what is the true basis of the law of frustration. Generally this has not been necessary: for example, Lord Porter said in *Denny, Mott & Dickson Ltd.* v. *James B. Fraser & Co. Ltd.*[8]: "Whether this result follows from a true construction "of the contract or whether it is necessary to imply a term or "whether again it is more accurate to say that the result follows "because the basis of the contract is overthrown, it is not neces-"sary to decide." These are the three grounds of frustration which have been suggested from time to time, and I think that it may make a difference in two respects which is chosen. Construction of a contract and the implication of a term are questions of law, whereas the question whether the basis of a contract is overthrown, if not dependent on the construction of the contract, might seem to be largely a matter for the judgment of a skilled man comparing what was contemplated with what has happened. And if the question is truly one of construction I find it difficult to see why we should not apply the ordinary rules regarding the admissibility of extrinsic evidence whereas, if it is only a matter of comparing the contemplated with the actual position, evidence might be admissible on a wider basis.

Further, I am not satisfied that the result is necessarily the same whether frustration is regarded as depending on the addition to the contract of an implied term or as depending on the construction of the contract as it stands.

Frustration has often been said to depend on adding a term to the contract by implication: for example, Lord Loreburn in *F. A. Tamplin Steamship Co. Ltd.* v. *Anglo-Mexican Petroleum Products Co. Ltd.*,[9] after quoting language of Lord Blackburn, said: "That seems to me another way of saying that from

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[7] 2 Hudson's Building Contracts, 4th ed., 122.

[8] [1944] A.C. 265, 281; 60 T.L.R. 419; [1944] 1 All E.R. 678.

[9] [1916] 2 A.C. 397, 404; 32 T.L.R. 677.

"the nature of the contract it cannot be supposed the "parties, as reasonable men, intended it to be binding on them "under such altered conditions. Were the altered conditions "such that, had they thought of them, they would have taken "their chance of them, or such that as sensible men they would "have said 'if that happens, of course, it is all over between us'? "What, in fact, was the true meaning of the contract? Since the "parties have not provided for the contingency, ought a court to say "it is obvious they would have treated the thing as at an end?"

I find great difficulty in accepting this as the correct approach because it seems to me hard to account for certain decisions of this House in this way. I cannot think that a reasonable man in the position of the seaman in *Horlock* v. *Beal* [10] would readily have agreed that the wages payable to his wife should stop if his ship was caught in Germany at the outbreak of war, and I doubt whether the charterers in the *Bank Line* case [11] could have been said to be unreasonable if they had refused to agree to a term that the contract was to come to an end in the circumstances which occurred. These are not the only cases where I think it would be difficult to say that a reasonable man in the position of the party who opposes unsuccessfully a finding of frustration would certainly have agreed to an implied term bringing it about.

I may be allowed to note an example of the artificiality of the theory of an implied term given by Lord Sands in *James Scott & Sons Ltd.* v. *Del Sel* [12]: "A tiger has escaped from a travelling "menagerie. The milkgirl fails to deliver the milk. Possibly "the milkman may be exonerated from any breach of contract; "but, even so, it would seem hardly reasonable to base that "exoneration on the ground that 'tiger days excepted' must be "held as if written into the milk contract."

I think that there is much force in Lord Wright's criticism in *Denny, Mott & Dickson Ltd.* v. *James B. Fraser & Co. Ltd.* [13]: "The parties did not anticipate fully and completely, if at all, "or provide for what actually happened. It is not possible, to my "mind, to say that, if they had thought of it, they would have "said: 'Well, if that happens, all is over between us.' On the "contrary, they would almost certainly on the one side or the "other have sought to introduce reservations or qualifications or "compensations."

It appears to me that frustration depends, at least in most cases, not on adding any implied term, but on the true construction of the terms which are in the contract read in light of the nature of the contract and of the relevant surrounding circumstances when the contract was made. There is much authority for this view. In *British Movietonews Ltd.* v. *London and District Cinemas Ltd.*[14] Viscount Simon said: "If, on the other "hand, a consideration of the terms of the contract, in the light "of the circumstances existing when it was made, shows that "they never agreed to be bound in a fundamentally different "situation which has now unexpectedly emerged, the contract "ceases to bind at that point—not because the court in its "discretion thinks it just and reasonable to qualify the terms of "the contract, but because on its true construction it does not "apply in that situation." In *Sir Lindsay Parkinson & Co. Ltd.* v. *Commissioners of Works*[15] Asquith L.J. said: "In each case "a delay or interruption was fundamental enough to transmute "the job the contractor had undertaken into a job of a different "kind, which the contract did not contemplate and to which it "could not apply, although there was nothing in the express "language of either contract to limit its operation in this way." I need not multiply citations, but I might note a reference by Lord Cairns so long ago as 1876 to "additional or varied work, so "peculiar, so unexpected, and so different from what any person "reckoned or calculated upon" (*Thorn* v. *London Corporation*[16]). On this view there is no need to consider what the parties thought or how they or reasonable men in their shoes would have dealt with the new situation if they had foreseen it. The question is whether the contract which they did make is, on its true construction, wide enough to apply to the new situation: if it is not, then it is at an end.

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[10] [1916] 1 A.C. 486; 32 T.L.R. 251.

[11] [1919] A.C. 435.

[12] 1922 S.C. 592, 597.

[13] [1944] A.C. 265, 275.

In my view, the proper approach to this case is to take from the arbitrator's award all facts which throw light on the nature of the contract, or which can properly be held to be extrinsic evidence relevant to assist in its construction and then, as a matter of law, to construe the contract and to determine whether the ultimate situation, as disclosed by the award, is or is not within the scope of the contract so construed.

The appellants on March 18, 1946, sent to the respondents with their tender a covering letter. I agree with your Lordships that this letter was not incorporated in the contract of July 9, 1946, and I do not think that it can be used in construing this contract. It was simply part of the preliminary negotiations and we do not know and cannot inquire why it was not incorporated in the contract.

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[14] [1952] A.C. 166, 185.

[15] [1949] 2 K.B. 632, 667; [1950] 1 All E.R. 208.

[16] (1876) 1 App.Cas. 120, 127.

The arbitrator has found that both parties "anticipated that "there would be available in the building industry a sufficient "labour force and a sufficient supply of materials to enable the "work specified in the agreement to be carried out substantially "within the time stipulated in the agreement." The nature of the contract is such that they must have expected this. The contract required the appellants to complete the work within eight months, and provided for payment of liquidated damages if the appellants failed to do so, subject to the surveyor being required in certain events to allow such additional time as he might deem fair and reasonable: and it was clearly of great importance to the appellants that there should be no substantial delay because any such delay was bound to add considerably to their costs. It appears from the arbitrator's findings that the parties did not make their expectations known to each other, and I do not think that a finding that the parties in fact expected that there would be no substantial delay adds anything material or alters the legal position.

The arbitrator then found that the conditions in which the work had to be carried out were different from those anticipated, in that at all times there was a serious shortage of labour and difficulty in obtaining adequate supplies of bricks and other material. He found that as a result of this shortage, and the consequent delay in completing the work, the actual cost to the appellants of carrying out the contract was £115,233, whereas the sum paid to them under the contract was £94,424. The arbitrator has not awarded the whole of the difference between these sums. He held that to some extent the appellants were themselves to blame, and awarded £17,651 as the additional cost and expense properly and unavoidably incurred by them.

If the contract continued to apply, then the appellants are not entitled to more than they have already received; but if it was brought to an end, then the respondents admit that the appellants are entitled to the sum awarded subject to a very small adjustment.

The arbitrator found that "the respondents accepted the "position and allowed the work to continue until finally com- "pleted on May 14, 1948, without serious objections by the "respondents." I do not think that that means, or was intended by the arbitrator to mean, that at some time while the work was in progress the parties agreed or must be held to have agreed that their contract should no longer apply and that the work should proceed on some other basis. There is no finding as to when any such agreement must be held to have been made, or what were its terms, and there are no facts found from which such an agreement could be inferred. The respondents no doubt recognized that the delays were not due to the fault of the appellants: they made no claim for liquidated damages, and they made no attempt to take the work out of the hands of the appellants, as they could have done if the appellants had been at fault. But that is no ground for inferring an agreement to terminate the contract and proceed on some different basis.

The appellant's case must rest on frustration, the termination of the contract by operation of law on the emergence of a fundamentally different situation. Using the language of Asquith L.J. (as he then was) which I have already quoted,[17] the question is whether the causes of delay or the delays were "fundamental "enough to transmute the job the contractor had undertaken "into a job of a different kind, which the contract did not con- "template and to which it could not apply." In most cases the time when the new situation emerges is clear; there has been some particular event which makes all the difference. It may be that frustration can occur as a result of gradual change, but, if so, the first question I would be inclined to ask would be when the frustration occurred and when the contract came to an end. It has been assumed in this case that it does not matter at what point during the progress of the work the contract came to an end, and that, whatever the time may have been, if the contract came to an end at some time the whole of the work must be paid for on a quantum meruit basis. I do not pursue this matter because the respondents have admitted that if there was frustration at any time the appellants are entitled to the sum awarded. But, even so, I think one must see whether there was any time at which the appellants could have said to the respondents that the contract was at an end, and that if the work was to proceed there must be a new contract, and I cannot find any time from first to last at which they would have been entitled to say that the job had become a job of a different kind which the contract did not contemplate. There is a difficulty about a party being entitled to go on and finish the work without raising the question that a new agreement is necessary, and then maintain that frustration occurred at some time while the work was in progress, but again I do not pursue that matter because it does not arise in view of the course this case has taken.

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[17] [1949] 2 K.B. 632, 667.

In a contract of this kind the contractor undertakes to do the work for a definite sum and he takes the risk of the cost being greater or less than he expected. If delays occur through no one's fault that may be in the contemplation of the contract, and there may be provision for extra time being given: to that extent the other party takes the risk of delay. But he does not take the risk of the cost being increased by such delay. It may be that delay could be of a character so different from anything contemplated that the contract was at an end, but in this case, in my opinion, the most that could be said is that the delay was greater in degree than was to be expected. It was not caused by any new and unforeseeable factor or event: the job proved to be more onerous but it never became a job of a different kind from that contemplated in the contract.

Bush v. *Whitehaven Port and Town Trustees* [18] appears to me to be a very special case, and it must be read in light of the development of the law in later cases. I agree with your Lordships' comments on it and I can get little assistance from it for the decision of the present case. I agree that this appeal should be dismissed.

LORD RADCLIFFE. My Lords, I agree that this appeal fails. Of the two main grounds upon which the appellants rely the shorter is that which concerns the question whether their building contract was made subject to a condition as to the availability of adequate supplies of labour and material by incorporating in its terms the relevant part of a letter from the appellants to the respondents dated March 18, 1946. I will deal with that point first. But at the outset I must remark that if I thought, as I do not, that the appellants were right in their argument that such a condition was incorporated, I should not necessarily conclude from that that they were entitled to succeed in their appeal. For their success would depend upon a further question: What significance should be attached to the words of the condition as part of the whole contract and what legal consequences should flow from them? As I believe that your Lordships are at one in thinking that the incorporation claimed never took place, I do not think that I need say anything more with regard to this further question except that it is itself a difficult one upon which some difference of view has already shown itself in the courts.

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[18] 2 Hudson's Building Contracts, 4th ed., 122.

[His Lordship stated the facts and continued:] These are the circumstances in which it has to be decided whether the second paragraph of this letter formed a qualifying condition incorporated into the building contract. As the formal agreement of July 9 was evidently intended to sum up everything that had emerged from the preceding negotiations, it is necessary for the appellants to show that that agreement somehow carried into its terms the stipulation contained in that second paragraph. Nor did their argument before your Lordships proceed on any other basis.

It is put in two ways. I do not agree with either of them. On the contrary, I agree with the way that this question was disposed of by Parker L.J. in the Court of Appeal: but, since the appellants' argument on this point commended itself both to the Lord Chief Justice in the Queen's Bench Division and to a majority of the Court of Appeal on the occasion of each hearing, it is only right that I should notice it with some particularity.

The formal agreement, as I have said, referred to and incorporated a number of the preliminary documents. These were listed in clause (2) as follows: "(*a*) the said tender; (*b*) the "drawings; (*c*) the general conditions of contract; (*d*) the specifi-"cation; (*e*) the bill of quantities; (*f*) the schedule of rates and "prices (if any)."

Now, what was the "said tender"? The actual form of the words is due to the only recital of the agreement, in which it is stated that the employer "has accepted a tender by the con-"tractor for the sum of £92,425," etc. The first way that the appellants put their case is that the tender referred to is the whole offer made on March 18, and that this offer included the second paragraph of the covering letter which was intended as a qualification of the terms of the form of tender.

My Lords, I think that this argument is a misreading of what the appellants and respondents intended by the formal agreement. Certainly all the other documents incorporated by clause 2 are separate named documents which the parties were at some pains to identify by their respective signatures. Everything points to the "said tender" being, similarly, the document called form of tender which the appellants had signed on March 18 and forwarded by their letter. Nothing else in fact could properly be referred to as a "tender": for there is a contradiction in terms in speaking of a letter which states that "our tender" is enclosed as if it were itself part of that very tender. As I see it, the truth of the matter is that in forwarding their tender the appellants proposed a qualification of the expected contract which the respondents did not accept and to which the appellants did not themselves return. I do not think it unfair to add the point that if they had, their stipulation could hardly have been left in its existing form which is at once sweeping and inconclusive.

The alternative argument rests upon the fact that the appendix to the form of tender had had written in it by the appellants a reference to the letter of March 18. But I do not see how this can avail them with regard to the second paragraph of that letter. For the whole purpose of the appendix was to provide a list of materials and goods that were to rank in allowing variations of the contract sum. In so far as parts of the letter did refer to prices of materials and goods, as indeed some did, I think that it would be correct to say that those passages formed part of the form of tender and, as such, might have been incorporated in the formal agreement. I say " might have been," because I think that the arbitrator's finding that the later schedule of prices supplied on May 20 was intended to constitute appendix I of the tender must mean that the original reference to the letter of March 18 ceased to have any contractual significance by the time that the formal agreement was made. But, however that may be, I think it plain that the reference in the appendix could only bear upon matters relating to the prices of materials and goods, and could not possibly have been understood by the parties as bearing upon the general question of the availability of supplies of labour and material. The context of the appendix makes it impossible to suppose that the reference was intended to introduce the letter of March 18 as a whole.

If the second paragraph of that letter did not form part of the contractual arrangements, the appellants' right to claim any payment beyond the original contract sum rests upon the argument that at some date before completion the original contract became frustrated by the continued shortage of the necessary supplies of labour and material, and that as from that date the building work was carried on under a new working arrangement, which admitted of further payment. The supplemental award of the arbitrator was drawn up on the basis that this argument succeeded. Despite his findings I think that the law is against the appellants on this point and that the award in their favour cannot be sustained.

Before I refer to the facts I must say briefly what I understand to be the legal principle of frustration. It is not always expressed in the same way, but I think that the points which are relevant to the decision of this case are really beyond dispute. The theory of frustration belongs to the law of contract and it is represented by a rule which the courts will apply in certain limited circumstances for the purpose of deciding that contractual obligations, ex facie binding, are no longer enforceable against the parties. The description of the circumstances that justify the application of the rule and, consequently, the decision whether in a particular case those circumstances exist are, I think, necessarily questions of law.

It has often been pointed out that the descriptions vary from one case of high authority to another. Even as long ago as 1918 Lord Sumner was able to offer an anthology of different tests directed to the factor of delay alone, and delay, though itself a frequent cause of the principle of frustration being invoked, is only one instance of the kind of circumstance to which the law attends (see *Bank Line Ltd.* v. *Arthur Capel & Co.*[19]). A full current anthology would need to be longer yet. But the variety of description is not of any importance so long as it is recognized that each is only a description and that all are intended to express the same general idea. I do not think that there has been a better expression of that general idea than the one offered by Lord Loreburn in *F. A. Tamplin Steamship Co. Ltd.* v. *Anglo-Mexican Petroleum Products Co. Ltd.*[20] It is shorter to quote than to try to paraphrase it: " . . . a court can and ought to examine the " contract and the circumstances in which it was made, not of " course to vary, but only to explain it, in order to see whether " or not from the nature of it the parties must have made their " bargain on the footing that a particular thing or state of things " would continue to exist. And if they must have done so, then " a term to that effect will be implied, though it be not expressed " in the contract. . . . no court has an absolving power, but it " can infer from the nature of the contract and the surrounding " circumstances that a condition which is not expressed was a " foundation on which the parties contracted." So expressed, the principle of frustration, the origin of which seems to lie in the development of commercial law, is seen to be a branch of a wider principle which forms part of the English law of contract as a whole. But, in my opinion, full weight ought to be given to the requirement that the parties " must have made " their bargain on the particular footing. Frustration is not to be lightly invoked as the dissolvent of a contract.

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[19] [1919] A.C. 435, 457–460.

[20] [1916] 2 A.C. 397, 403.

Lord Loreburn ascribes the dissolution to an implied term of the contract that was actually made. This approach is in line with the tendency of English courts to refer all the consequences of a contract to the will of those who made it. But there is something of a logical difficulty in seeing how the parties could even impliedly have provided for something which ex hypothesi they neither expected nor foresaw; and the ascription of frustration to an implied term of the contract has been criticized as obscuring the true action of the court which consists in applying an objective rule of the law of contract to the contractual obligations that the parties have imposed upon themselves. So long as each theory produces the same result as the other, as normally it does, it matters little which theory is avowed (see *British Movietonews Ltd.* v. *London and District Cinemas Ltd.*,[21] *per* Viscount Simon). But it may still be of some importance to recall that, if the matter is to be approached by way of implied term, the solution of any particular case is not to be found by inquiring what the parties themselves would have agreed on had they been, as they were not, forewarned. It is not merely that no one can answer that hypothetical question: it is also that the decision must be given "irrespective of the "individuals concerned, their temperaments and failings, their "interest and circumstances" (*Hirji Mulji* v. *Cheong Yue Steamship Co. Ltd.*[22]). The legal effect of frustration "does not depend "on their intention or their opinions, or even knowledge, as to "the event."[23] On the contrary, it seems that when the event occurs "the meaning of the contract must be taken to be, not "what the parties did intend (for they had neither thought nor "intention regarding it), but that which the parties, as fair and "reasonable men, would presumably have agreed upon if, having "such possibility in view, they had made express provision as "to their several rights and liabilities in the event of its occur"rence" (*Dahl* v. *Nelson*,[24] *per* Lord Watson).

By this time it might seem that the parties themselves have become so far disembodied spirits that their actual persons should be allowed to rest in peace. In their place there rises the figure of the fair and reasonable man. And the spokesman of the fair and reasonable man, who represents after all no more than the anthropomorphic conception of justice, is and must be the court itself. So perhaps it would be simpler to say at the outset that frustration occurs whenever the law recognizes that without default of either party a contractual obligation has become incapable of being performed because the circumstances in which performance is called for would render it a thing radically different from that which was undertaken by the contract. Non haec in foedera veni. It was not this that I promised to do.

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[21] [1952] A.C. 166, 184.

[22] [1926] A.C. 497, 510; 42 T.L.R. 359.

[23] [1926] A.C. 497, 509.

[24] (1881) 6 App.Cas. 38.

There is, however, no uncertainty as to the materials upon which the court must proceed. "The data for decision are, on "the one hand, the terms and construction of the contract, read "in the light of the then existing circumstances, and on the other "hand the events which have occurred" (*Denny, Mott & Dickson Ltd.* v. *James B. Fraser & Co. Ltd.*,[25] *per* Lord Wright). In the nature of things there is often no room for any elaborate inquiry. The court must act upon a general impression of what its rule requires. It is for that reason that special importance is necessarily attached to the occurrence of any unexpected event that, as it were, changes the face of things. But, even so, it is not hardship or inconvenience or material loss itself which calls the principle of frustration into play. There must be as well such a change in the significance of the obligation that the thing undertaken would, if performed, be a different thing from that contracted for.

I am bound to say that, if this is the law, the appellants' case seems to me a long way from a case of frustration. Here is a building contract entered into by a housing authority and a big firm of contractors in all the uncertainties of the post-war world. Work was begun shortly before the formal contract was executed and continued, with impediments and minor stoppages but without actual interruption, until the 78 houses contracted for had all been built. After the work had been in progress for a time the appellants raised the claim, which they repeated more than once, that they ought to be paid a larger sum for their work than the contract allowed; but the respondents refused to admit the claim and, so far as appears, no conclusive action was taken by either side which would make the conduct of one or the other a determining element in the case.

That is not in any obvious sense a frustrated contract. But the appellants' argument, which certainly found favour with the arbitrator, is that at some stage before completion the original contract was dissolved because it became incapable of being performed according to its true significance and its place was taken by a new arrangement under which they were entitled to be paid, not the contract sum, but a fair price on quantum meruit for the work that they carried out during the 22 months that elapsed between commencement and completion. The contract, it is said, was an eight months' contract, as indeed it was. Through no fault of the parties it turned out that it took 22 months to do the work contracted for. The main reason for this was that, whereas both parties had expected that adequate supplies of labour and material would be available to allow for completion in eight months, the supplies that were in fact available were much less than adequate for the purpose. Hence, it is said, the basis or the footing of the contract was removed before the work was completed; or, slightly altering the metaphor, the footing of the contract was so changed by the circumstance that the expected supplies were not available that the contract built upon that footing became void. These are the findings which the arbitrator has recorded in his supplemental award.

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[25] [1944] A.C. 265, 274–275.

In my view, these are in substance conclusions of law, and I do not think that they are good law. All that anyone, arbitrator or court, can do is to study the contract in the light of the circumstances that prevailed at the time when it was made and, having done so, to relate it to the circumstances that are said to have brought about its frustration. It may be a finding of fact that at the time of making the contract both parties anticipated that adequate supplies of labour and material would be available to enable the contract to be completed in the stipulated time. I doubt whether it is, but, even if it is, it is no more than to say that when one party stipulated for completion in eight months, and the other party undertook it, each assumed that what was promised could be satisfactorily performed. That is a statement of the obvious that could be made with regard to most contracts. I think that a good deal more than that is needed to form a "basis" for the principle of frustration.

The justice of the arbitrator's conclusion depends upon the weight to be given to the fact that this was a contract for specified work to be completed in a fixed time at a price determined by those conditions. I think that his view was that, if without default on either side the contract period was substantially extended, that circumstance itself rendered the fixed price so unfair to the contractor that he ought not to be held to his original price. I have much sympathy with the contractor, but, in my opinion, if that sort of consideration were to be sufficient to

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Lord Radcliffe.

establish a case of frustration, there would be an untold range of contractual obligations rendered uncertain and, possibly, unenforceable.

Two things seem to me to prevent the application of the principle of frustration to this case. One is that the cause of the delay was not any new state of things which the parties could not reasonably be thought to have foreseen. On the contrary, the possibility of enough labour and materials not being available was before their eyes and could have been the subject of special contractual stipulation. It was not made so. The other thing is that, though timely completion was no doubt important to both sides, it is not right to treat the possibility of delay as having the same significance for each. The owner draws up his conditions in detail, specifies the time within which he requires completion, protects himself both by a penalty clause for time exceeded and by calling for the deposit of a guarantee bond and offers a certain measure of security to a contractor by his escalator clause with regard to wages and prices. In the light of these conditions the contractor makes his tender, and the tender must necessarily take into account the margin of profit that he hopes to obtain upon his adventure and in that any appropriate allowance for the obvious risks of delay. To my mind, it is useless to pretend that the contractor is not at risk if delay does occur, even serious delay. And I think it a misuse of legal terms to call in frustration to get him out of his unfortunate predicament.

The arbitrator had put upon him the duty of making further findings of fact " relevant to the application of the principle in " the case of *Bush* v. *Whitehaven Port and Town Trustees.*[26] " This may have been hard upon him, for it implies that that decision can be ascribed to one ascertainable principle. In my opinion, it cannot. The judgment of the Court of Appeal applied a different principle of law from that upon which the trial judge's questions to the jury (and their answers) were based; and the judgment of the Divisional Court was more or less evenly balanced between the two. According to the findings of the jury taken together, the case was one in which all the work done by Bush had been done under the original contract; the contract was such that it carried an implied term that the Whitehaven trustees should give possession of the whole site without delay; the delay which had taken place changed the conditions of the contract to such an extent that the " special provisions " precluding Bush from making any complaint of delay could no longer be applied, and Bush was entitled to damages for breach of contract arising from the trustees' failure to keep the implied term, the damages being represented by the additional cost of the work to him over and above the contract price. It may be difficult to say by what principle of law the "special provisions" of the contract became inapplicable while the contract itself remained enforceable; but I suppose that judge and jury had in mind that the parties by their conduct had waived the enforcement of the particular clause. There is nothing out of order in such a finding, so long as the facts proved are clear enough to warrant it, though normally one would expect them to include some discussion, oral or written, between the parties. I daresay that everyone felt that rough justice had been done.

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[26] 2 Hudson's Building Contracts, 4th ed., 122.

The Court of Appeal, however, decided the case upon a basis which had only a slight resemblance to the findings of the jury. By ignoring all the findings except that which related to the change in the "conditions of the contract," and by treating that as if it applied to the contract as a whole and not merely to whatever was to be understood by the words "special provisions," they arrived at a new view of the facts upon which they thought that a case of frustration could be made out. At some time, apparently unknown to and unmarked by the parties concerned, the original contract had disappeared with all its incidents and obligations and in its place had been set up the legal relationship expressed in Bush's claim (though he had not made it) to be paid on the basis of a "quantum meruit." I should have thought that it would have been much simpler to say, had the findings of the jury warranted it, that the parties had abandoned the original contract by mutual consent and substituted for it a new contract containing the substance of the old terms but a reasonable price clause instead of the former fixed price. But that is not frustration; it is fulfilment with variations.

My Lords, I think that *Bush* v. *Whitehaven Port and Town Trustees* [26] may be worth remembering as an instance of what can happen to a case during its passage through successive courts, but I do not think it worth recording as an exposition of any principle of law. In that regard the editors of the Law Reports, who ignored it, showed a sounder judgment than Mr. Hudson, who enshrined it. In so far as it applied the principle of frustration to the facts of the case, the principle was in my view misapplied.

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[26] 2 Hudson's Building Contracts, 4th ed., 122.

In so far as the judgments of the Court of Appeal contain general statements as to the law of frustration, I think that the subject has been so fully explored in later cases of higher authority that the particular exposition is of no real value. I am sincerely sorry if our decision embarrasses builders, who may in some cases have found in the second volume of Hudson on Building Contracts a way of mitigating the risks of tenders to which the law did not truly entitle them. But, in my view, their safety lies in the insertion of explicit conditions in any fixed price contracts they may undertake; it does not lie in an appeal to the principle of frustration.

LORD SOMERVELL OF HARROW. My Lords, I agree that the words on which the appellants seek to rely in the letter of March 18 were not incorporated in the contract.

I have had the advantage of reading the opinion which has just been read by my noble and learned friend, Lord Reid. I agree with him that it is desirable to decide what is the proper basis of "frustration." I also agree with his conclusion on that matter and I should add nothing except the possibility of confusion if I sought to restate it in my own words.

I therefore turn to its application to the issues in the present appeal. As the senior member of the Court of Appeal which remitted the case to the arbitrator, I would like to express my regret that we did not give more assistance to enable him to distinguish the "facts" from his conclusion on them. Fortunately, one or two questions put to counsel in the course of the argument showed that there was now no conflict as to relevant facts.

Contracts to be performed in futuro are based on expectations. If each party is equally well informed as to the data on which expectations must be based, it may be said that these expectations are the "basis" or "footing" on which the contract is made. It would, of course, be absurd to suggest that if such expectations are not realized the "basis" has gone and the contract is frustrated. As Lord Sumner said in *Larrinaga & Co.* v. *Société Franco-Américaine des Phosphates de Medulla*[27]: "In effect "most forward contracts can be regarded as a form of commercial "insurance, in which every event is intended to be at the risk of "one party or another." Later he said[28]: "No one can tell "how long a spell of commercial depression may last; no suspense

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[27] (1923) 92 L.J.K.B. 455, 464; 39 T.L.R. 316.

[28] 92 L.J.K.B. 455, 465.

"can be more harassing than the vagaries of foreign exchanges, "but contracts are made for the purpose of fixing the incidence "of such risks in advance, and their occurrence only makes it "the more necessary to uphold a contract and not to make them "the ground for discharging it."

Under the present contract, was the risk of shortage of skilled labour fixed on the appellants? A builder who undertakes to finish a building by a certain day is, on the face of it, plainly taking such a risk. There are provisions in the present contract which re-enforce this construction, were it necessary to do so. With regard to prices of certain materials and rates of wages there are what are called escalator clauses. The appellants were not prepared to take the risk of increases in these matters. The parties also directed their minds to the possibility of the work not being completed in the specified time. The appellants were to pay so much per week in damages. Extra time could, however, be allowed if there was delay by strikes or if the work was stopped by order of the surveyor. This is to me a somewhat obscure clause, but it is sufficient that there was an exception clause for delay which did not cover shortage of labour, and provided only for relief from penalties and not for any extra cost that the delay might cause the appellants. The shortage of skilled labour, as is shown by the admitted figures set out in the points of claim, was very substantial. Evidence was called, which may not have been admissible, to show that the expectations were based on statements on behalf of the Government as to the probable availability of skilled labour. A party contracting in the light of expectations based on data of that or any other kind must make up his mind whether he is prepared to take the risk of those expectations being disappointed. If not, then he will refuse to contract unless protected by some specific provision. There is no such provision here. The appellants took the risk under the contract, and it seems to me quite impossible to maintain that the contract did not apply in the situation as it remained, the expectations on which the estimate was based not having been realized.

But for the decision in *Bush* v. *Whitehaven Port and Town Trustees*[29] I doubt if the issue of frustration would ever have been raised. I will give my reasons as shortly as I can for thinking that that case should not hereafter be citable as a decision relevant to the law of frustration. The case was fully examined by Cohen L.J., as he then was, in *Sir Lindsay Parkinson & Co. Ltd.* v. *Commissioners of Works.*[30] The plaintiffs' claim was for extra expenses incurred on work and labour in that the defendants had not made the site on which the plaintiffs were to do the work available as required. The delay was substantial and turned a summer contract into a winter contract. The defendants relied on an exception clause providing that a failure to make the site available when required should not "vitiate or affect the con- "tract." I think that the jury took the view, whether sound in law or not, that the delay was so great that it ought not to be covered by the exception and that the defendants should be treated as in breach. It is the form of two of the questions left to the jury that led the courts to deal with the case as one of frustration. The first two questions and answers were as follows: "(1) Was "it the duty of the defendants under the contract to be in a "position at the commencement of and at all times during the "contract to give the contractor the use of so much of the site "of the works as might, in the opinion of the engineer, be required "to enable the contractor to commence and continue the execu- "tion of the works in accordance with the contract? A. Yes. "(2) Was the contract made upon the basis that the defendants "would be in a position to act as aforesaid? A. Yes." I doubt if this second question was a proper question to put. It was in any event liable to mislead. "Basis" may mean no more than "expectation." If it means more, it is difficult to reconcile questions (1) and (2) with giving any effect to the exception clause. The fifth question is also difficult: "Were the conditions of the "contract so completely changed, in consequence of the defen- "dants' inability to hand over the sites of the work as required, "as to make the special provisions of the contract inapplicable? "A. Yes." This does not suggest that the contract is gone altogether but only that the special provisions are inapplicable. The jury, in my view, took these words as referring to the exception. Question 8 was as to the "damage suffered," and the jury awarded £600 over and above the contract price.

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[29] 2 Hudson's Building Contracts, 4th ed., 122.

It appears that Lord Esher had some doubt whether the answer to the fifth question should be taken as a binding finding. Findings by juries on mixed questions of law and fact are not precedents. That is, no doubt, why the case was not reported in any law report. I doubt myself, with respect, whether on the findings of the jury taken with the terms of the contract it was possible to treat it as a frustration case. I am clear that it cannot be regarded as a precedent in the law of frustration as applied to building or any other contracts.

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[30] [1949] 2 K.B. 632.

I would dismiss the appeal.

Appeal dismissed.

Solicitors: *Blakeney & Marsden Popple & Co.; Kingsford, Dorman & Co. for Blake, Lapthorn, Roberts & Rea, Portsmouth.*

F. C.

[HOUSE OF LORDS.]

H. L. (E.)*
1956
Feb. 21, 22, 23;
Mar. 26.

SMITH . . . . APPELLANT;

AND

EAST ELLOE RURAL DISTRICT COUNCIL AND OTHERS . . . . . . RESPONDENTS.

Compulsory Purchase — Order — Validity — Allegation of bad faith — Questioning order — Court's jurisdiction — Acquisition of Land (Authorization Procedure) Act, 1946 (9 *&* 10 *Geo.* 6, *c.* 49), *Sch. I, Pt. IV, paras.* 15, 16.
Statute—Construction—Jurisdiction.

By paragraph 15 (1) of Part IV of Schedule I to the Acquisition of Land (Authorization Procedure) Act, 1946: "If any person "aggrieved by a compulsory purchase order desires to question the "validity thereof . . . on the ground that the authorization of a "compulsory purchase thereby granted is not empowered to be "granted under this Act . . . he may, within six weeks from the "date on which notice of the confirmation or making of the order ". . . is first published . . . make an application to the High "Court. . . ."

By paragraph 16: "Subject to the provisions of the last fore-"going paragraph, a compulsory purchase order . . . shall not . . . "be questioned in any legal proceedings whatsoever. . . ."

Land belonging to the appellant having been made the subject of a compulsory purchase order, she brought an action, more than six weeks after notice of its confirmation had been published, against the local authority which had obtained it, the clerk to the local authority and the Government Department which had confirmed it, claiming damages, an injunction against further trespass on the land, a declaration that the order was made and confirmed wrongfully and in bad faith and that the clerk acted wrongfully and in bad faith in procuring the order and its confirmation. An application was made to strike out the writ of summons:—

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* *Present*: VISCOUNT SIMONDS, LORD MORTON OF HENRYTON, LORD REID, LORD RADCLIFFE and LORD SOMERVELL OF HARROW.

Held (1) (unanimously) that the action might proceed against the clerk to the council for damages but (2) (*per* Viscount Simonds, Lord Morton of Henryton and Lord Radcliffe, Lord Reid and Lord Somervell of Harrow dissenting) that the action against the council and the Government Department could not proceed by reason of the plain prohibition in paragraph 16 (which applied to compulsory purchase orders in general) against questioning the validity of the order, whereby the jurisdiction of the court was ousted.

Per Lord Morton of Henryton, Lord Reid and Lord Somervell of Harrow, Lord Radcliffe dissenting: Paragraph 15 gives no opportunity to a person aggrieved to question the validity of a compulsory purchase order on the ground that it was made or confirmed in bad faith.

Decision of the Court of Appeal [1955] 1 W.L.R. 380; [1955] 2 All E.R. 19 varied.

APPEAL from the Court of Appeal (Hodson and Parker L.JJ.).

This was an appeal from an order of the Court of Appeal dated March 4, 1955, dismissing the appeal of the appellant, Kathleen Rose Smith, widow, from an order of Havers J., dated October 4, 1954. This order in turn dismissed her appeals from two orders of Master Clayton dated August 6, 1954, ordering that the writ of summons in this action and all subsequent proceedings therein be set aside with costs to be taxed and paid by her to the East Elloe Rural District Council, J. C. Pywell, the clerk to the council, and the Ministry of Housing and Local Government, the respondents in this appeal, and the Ministry of Health, then a defendant in the action but now no longer a party.

The facts, stated in the opinions of Viscount Simonds and Lord Morton of Henryton, were as follows: On July 6, 1954, the appellant, Kathleen Rose Smith, issued a writ against the East Elloe Rural District Council, Mr. Pywell, the clerk to that council, and the Ministry of Health, whose functions and obligations were subsequently transferred to the Ministry of Housing and Local Government. She claimed:

1. Against the East Elloe Rural District Council: "(a) Damages for trespass to the plaintiff's land of 8·613 acres "situate at Hallgate, Holbeach, in the County of Lincoln, together "with the dwelling-house known as 'Hall Hill House' and other "buildings on the said land or on some parts thereof. (b) An "injunction restraining them by their officers, servants and "agents and each and every of them from trespassing upon the

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"aforesaid land and premises of the plaintiff or any part thereof "or from entering upon the said lands and premises without the "consent of the plaintiff. (c) A declaration that the compulsory "purchase order dated August [26], 1948, was wrongfully made "and in bad faith."

2. Against the Ministry of Health: "A declaration that the "said compulsory purchase order was wrongfully confirmed on "November 29, 1948, and in bad faith."

3. Against the respondent J. C. Pywell, who was clerk to the said rural district council at the relevant dates: "A declaration "that he knowingly acted wrongfully and in bad faith in procur-"ing the said order and confirmation of the same."

4. Against the Ministry of Housing and Local Government: "As having taken over the functions of the [Ministry of Health] "a declaration that the said compulsory purchase order and "confirmation of the same are in bad faith."

5. Further and other relief.

6. Damages.

7. Costs.

The compulsory purchase order challenged in these proceedings was made by the respondent council on August 26, 1948, and purported to authorize them, subject to its provisions, to acquire compulsorily the house and some 8½ acres of land, of which the appellant was owner, mentioned in the writ and described in the schedule to the order. The statutory public local inquiry having been duly held, the Minister of Health confirmed the order on November 29, 1948, by an order cited as the East Elloe (Holbeach) Housing Confirmation Order, 1948, which was duly advertised on December 13 and 20, 1948. A notice to treat and a notice of entry were duly served on the appellant, and in due course the compulsory purchase price for the said house and land was fixed by the Lands Tribunal at £3,000. The respondent council caused a firm of builders to demolish the house and to erect on its site and on the said land a number of houses.

The relevant functions of the Minister of Health and the obligations of the Ministry of Health were subsequently transferred to the Minister and the Ministry of Housing and Local Government by the Transfer of Functions (Minister of Health and Minister of Local Government and Planning) (No. 1) Order, 1951 (S.I. 1951, No. 142).

All the respondents entered conditional appearances to the writ, and on July 27, 1954, the respondent council and their clerk and the Ministry of Health and the Ministry of Housing and Local

Government applied, by two separate summonses, to Master Clayton under Ord. 12, r. 30, of the Rules of the Supreme Court, for an order that the writ and all subsequent proceedings in the action be set aside. The grounds upon which the claim in each summons was based were: "That the writ of summons in this "action is invalid for lack of jurisdiction it being provided by "paragraph 16 of Part IV of Schedule I to the Acquisition of "Land (Authorization Procedure) Act, 1946, that save by the "procedure specified in the said schedule a compulsory purchase "order confirmed in accordance with the provisions of the said "Act (as was here the case) shall not, either before or after it "has been confirmed be questioned in any legal proceedings "whatsoever by reason whereof this honourable court has no jurisdiction to grant the relief sought against the said defendants."

Master Clayton made an order on each summons setting aside the writ and all subsequent proceedings in the action, and his decision was affirmed by Havers J. and by the Court of Appeal (Hodson and Parker L.JJ.). That court refused leave to appeal, but leave was subsequently granted by the Appeal Committee of the House of Lords.

Roy Wilson Q.C. and *F. H. Collier* for the appellant. A question arises whether paragraph 16 of Part IV of Schedule I to the Acquisition of Land (Authorization Procedure) Act, 1946, covers all compulsory purchase orders in general or only compulsory purchase orders in respect of land to which Part III applies. The actual intention of the legislature is not relevant; one is concerned only with the meaning of the words embodied in the statute, one which touches the liberty of the subject and expropriation. Unless compelled to do so by the words of the Act, the court should not construe it against the subject. If there is a reasonable doubt as to the meaning of the words in paragraph 16, it should be resolved in favour of the appellant. The meaning contended for by the respondents, if it was intended, could have been made clear by placing a comma after the words "compulsory "purchase order."

The following propositions are submitted: (1) It is entirely repugnant to the intention of the legislature that the statutory powers which it grants should be abused. (2) An act done in ostensible exercise of statutory powers, but dishonestly or in bad faith, is not in truth a genuine exercise of the power but an abuse of it. (3) It is therefore unnecessary and even illogical for a statute to make provision for what is to happen in the event of a person purporting to exercise a statutory power in bad faith. (4) Conversely, where provision is made as to the circumstances in which the purported exercise of statutory powers may be invalidated, such provisions are to be construed, not as being directed to the question whether or not the power is exercised bona fide, but as being made on the assumption that it has been made bona fide. See Maxwell on Interpretation of Statutes, 10th ed., p. 122 (a passage substantially unchanged since the first edition in 1875 at p. 99), pp. 128, 285, the cases cited in Davies on Planning, Compulsory Purchase and Rating Law, p. 15, note (*n*), and Halsbury's Laws of England, 2nd ed., vol. XXXI, pp. 533–534. Although prima facie paragraph 16 excludes the jurisdiction of the court, the words "made in good faith" should be read in after the words "order" and "certificate." It is inconceivable that the legislature should have intended to sanction the exercise of powers otherwise than in good faith. A statute referring to the exercise of powers always means that it shall be exercised in good faith. Where there is bad faith there is much more general need for the court's interference than where there is good faith. See *Ex parte Cowan*[1]; *Ex parte Baum*[2]; *Biddulph* v. *St. George's, Hanover Square*[3]; *Westminster Corporation* v. *London and North Western Railway Co.*[4]; *Roberts* v. *Hopwood*[5]; *Short* v. *Poole Corporation*[6]; *Carltona Ltd.* v. *Commissioners of Works*[7]; *Associated Provincial Picture Houses Ltd.* v. *Wednesbury Corporation*[8]; *Rex* v. *Paddington and St. Marylebone Rent Tribunal*[9]; *Demetriades* v. *Glasgow Corporation*,[10] and *Lazarus Estates Ltd.* v. *Beasley*.[11]

The authorities relied on against the appellant are *Tutin* v. *Northallerton Rural District Council*[12]; *Uttoxeter Urban District Council* v. *Clarke*,[13] and *Woollett* v. *Minister of Agriculture and Fisheries*.[14]

There is admittedly a risk that compulsory purchase orders may be challenged at any time within six years, but it must be run in order to ensure that local authorities exercise their powers bona fide.

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[1] (1867) L.R. 2 Ch. 563, 567.

[2] (1878) 7 Ch.D. 719, 720, 721.

[3] (1863) 3 De G.J. & S. 493, 502.

[4] [1905] A.C. 426, 430, 439; 21 T.L.R. 686.

[5] [1925] A.C. 578, 589, 603, 611, 616–617; 41 T.L.R. 436.

[6] [1926] Ch. 66, 85, 88, 91; 42 T.L.R. 107.

[7] [1943] 2 All E.R. 560, 563–564.

[8] [1948] 1 K.B. 223, 228; 63 T.L.R. 623; [1947] 2 All E.R. 680.

[9] [1949] 1 K.B. 666, 678–679; 65 T.L.R. 200; [1949] 1 All E.R. 720.

[10] [1951] 1 T.L.R. 396, 398, 400, 401, 403; [1951] 1 All E.R. 457.

[11] [1956] 1 Q.B. 702, 711, 717–718, 721; [1956] 1 All E.R. 341.

[12] [1947] W.N. 189.

[13] [1952] 1 All E.R. 1318.

[14] [1955] 1 Q.B. 103; [1954] 3 All E.R. 529.

The respondents have contended that the analogous provisions of section 2 of the Limitation Act, 1939, are not subject to any qualification in respect of allegations of fraud save as is expressly provided by section 26. But the analogy is not close because the present case is one of jurisdiction and the Limitation Act goes to time, not jurisdiction. The analogy is all in the appellant's favour. It is only because of the terms of section 2 that section 26 was necessary. The inference is that if the legislature had intended to provide a remedy for fraud or bad faith in paragraph 15 of Part IV, it would have included in the Act of 1946 a provision comparable to section 26. The absence of such a provision is a strong indication that paragraph 15 was not intended to apply to cases of fraud or mala fides. It gives a person aggrieved no adequate opportunity in the time limited to challenge an order on that ground.

There are several reasons why section 15 cannot cover cases of challenge on the ground of fraud or mala fides. It should be given its natural meaning, which does not cover such cases. It is inappropriate to deal with such cases. There is a distinction between nullity due to fraud or mala fides and nullity produced by other means. There is no provision for extending the very short time allowed for challenge, which is inadequate where there is fraud or mala fides. The person aggrieved is placed within very narrow limits. There is no reference to certificates under Part III of the Schedule.

If the only remedy for fraud or bad faith were under paragraph 15 the position would be startling, because a local authority might make a compulsory purchase order ostensibly to obtain land to provide houses for the working classes and, when six weeks had elapsed, it might announce that it had never so intended but meant to use the site for a swimming pool. If the respondents were right there would be no way in which that local authority could be made to account to the owner whose property it had taken.

It has been suggested that it would be impossible to give the appellant the remedies which she seeks against the council because her house has been demolished and the land has been developed for housing. But the objection which the respondents are making is one of jurisdiction and, once a case is before the court as a matter of jurisdiction, it has ample means of dealing with situations where a plaintiff should not be given the full relief claimed. In the writ the appellant asks not only for damages for trespass but also for damages generally (paragraph 6). There are cases when a plaintiff with a right to property may be relegated to less than his full legal remedy of recovery of the property. The difficulty of giving the appellant back her land should not be a bar to the court's jurisdiction. If someone unlawfully takes her land the court should be able to inquire into the matter.

If powers are conferred by an Act of Parliament which contains words excluding the jurisdiction of the court, these must not be construed as applying to acts done in bad faith, unless the contract absolutely demands it. That is how one should approach a statutory provision in general terms which does not appear to be in accord with the general tenor of the law.

A compulsory purchase order made mala fide is not a compulsory purchase order at all and so paragraph 16 does not refer to it, because such an order is a nullity vitiated from the beginning, a nullity in more than the sense of an act done ultra vires.

Where the language of a statute in its ordinary meaning obviously contradicts the apparent purpose of the enactment or leads to some absurdity or injustice, presumably not intended, a construction may be put on it which modifies the meaning: Maxwell on the Interpretation of Statutes, 10th ed., p. 229. (It is the same in the first edition, p. 209.) It is not sought to cut down the words "in any legal proceedings whatsoever" in paragraph 16. It is sought to add to the words "compulsory purchase "order" the words "made bona fide." The construction of a statute should be designed to carry out its intention. If powers are conferred and words are used excluding the jurisdiction of the court, one must construe those words as not applying to acts done in bad faith unless the context absolutely demands it. As to cutting down general words in accordance with the presumed intention of a statute, see Maxwell on Interpretation of Statutes, 10th ed., pp. 201–203, and *Calder* v. *Halket*[15] cited there, a case analogous to this. The words "compulsory purchase order" must be construed as meaning either "made in good faith" or "whether made in good or bad faith," and the court can construe it, according to the laws of construction, by ascertaining what the intention of the legislature must have been. The legislature's intention is that the powers conferred by it shall not be abused and enactments should be construed in the light of that overriding intention. The alternative is to hold that the legislature intended that the powers conferred by it should be abused with impunity, that it conferred a charter to abuse those powers. That cannot have been the intention of the Act. Of late the courts have often been shorn of their power to interfere with executive acts, but it has always retained the function of seeing that, wide as the delegated powers may be, they are not exercised dishonestly or with ulterior motives. Any intention in a statute to override that function would have to be clearly proved.

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[15] (1840) 3 Moo.P.C. 28, 74.

F. H. Collier following. The provision in paragraph 16 is limited to the case of compulsory acquisition of land of the type dealt with under Part III of the Schedule. The words "under "Part III of this Schedule" qualify all that goes before, "com"pulsory purchase order" as well as "certificate." Parliament intended that the right of challenge by private individuals should be retained but that it should not be retained in the case of the large bodies mentioned in Part III. Compare the provisions in Schedule II of the Housing Act, 1936. The language in the Act of 1946 is such as to leave resort to the courts in all other cases but those within Part III. If it had been meant to cover cases besides those in Part III, words would have been used specifying compulsory purchase orders made under any other Act. Many local Acts confer power to acquire land, but in them no complete bar such as is here contended for appears. The complete bar appears for the first time in the Act of 1936.

Sir Reginald Manningham-Buller Q.C., A.-G., Rodger Winn and *W. L. Roots* for the respondents. The respondents do not challenge the general proposition that statutory powers must be exercised bona fide. But it does not follow that there is always a power to challenge their exercise as invalid on the ground of fraud. During six weeks after a compulsory purchase order has been confirmed it may be challenged under paragraph 15 on the ground of fraud, or bad faith, or on any other ground showing that it was not within the powers conferred by the Act. But it cannot be challenged thereafter. There is also the public inquiry in the compulsory purchase procedure. A statute creating a power may oust the jurisdiction of the court to inquire into its exercise. It is a fallacy to treat paragraphs 15 and 16 as if they related to the exercise of the power.

In the Housing Acts one finds steps taken to oust the jurisdiction of the courts, the high-water mark being sections 40 and 64 and paragraph 2 of Schedule III of the Housing Act, 1925. See also section 57 (1) of the Housing of the Working Classes Act, 1890, section 297 of the Public Health Act, 1875, section 2 of

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the Housing, Town Planning, etc., Act, 1909, and section 10 of the Housing Act, 1930, which has some similarity to the relevant provisions in this case. These support the proposition that once an order has been confirmed and the time limited by paragraph 15 has expired it is not possible to challenge its validity. One reason is that the people who might suffer, if such a challenge succeeded, would be the inhabitants of the council houses. Grave inconveniences would result if actions could be brought at any time within the Statute of Limitations. In the present case the writ was issued more than five years after the order was confirmed. If the appellant is right in the case which she seeks to make, there is no question but that the land is hers with all the consequences which ensue. It illustrates the reason why such orders can only be challenged up to the time when they have been made final. A challenge on the ground of mala fides can be made under paragraph 15 by virtue of the words "not empowered to "be granted under this Act."

As to the principles on which a ministerial order may be challenged, see *Batson* v. *London School Board*[16]; *Rex* v. *Minister of Health; Ex parte Davis*,[17] and *Minister of Health* v. *Rex (on the prosecution of Yaffe)*.[18]

Under paragraphs 15 and 16 an application to the court within a limited period is allowed, but after the six weeks have elapsed any further questioning of a compulsory purchase order is barred. The limitation has regard to the chaos which would be caused in the housing of the working classes if there were no limitation. It is not accepted that fraud was a casus improvisus in the Act, but, whether it was or not, the language ousting the jurisdiction of the courts is as clear as it could be, and was obviously meant to limit all right of challenge to six weeks. The word "whatsoever" in paragraph 16 is emphatic. Similar provisions may be found in section 162 of the Local Government Act, 1933, section 11 (3) of the Housing Act, 1930, section 16 (3) of the Housing Act, 1935, Schedule II, paragraph 2, of the Housing Act, 1936, and the Town and Country Planning Acts. If the local authority did not use the land as it said it would, appropriate action could be taken.

If this writ questions a compulsory purchase order, then, in view of the clear words of paragraph 16, the court has no jurisdiction. *Tutin* v. *Northallerton Rural District Council*[19] supports the submission that the fact that there is a claim for damages here does not give the court jurisdiction, because that very claim questions the compulsory purchase order. The enactment was designed to secure finality and protect the occupants of housing estates who might otherwise be held to be trespassers. For that reason the Housing Acts have ousted the jurisdiction of the courts. Whatever may be the cause of complaint in relation to a compulsory purchase order, it cannot be questioned. To vary the language of paragraph 16 so that the order could be questioned would be to defeat the intention of Parliament. There can be no challenge unless it can be brought within paragraph 15. No authority has been suggested for the proposition that a challenge on the ground of bad faith would not come within paragraph 15. Bad faith is one example of ultra vires: see *Short* v. *Poole Corporation*[20] and Maxwell on Interpretation of Statutes, 10th ed., p. 123. The language of the paragraph does not compel one to exclude an objection on the ground of mala fides. It should certainly be given its natural meaning, and its language is not inappropriate to cover fraud and mala fides; the nature of the relief provided is that which one would expect. There is no difference between nullity produced by fraud and mala fides and nullity produced in any other way: see *Woollett* v. *Minister of Agriculture and Fisheries*,[21] which was rightly decided. The point on the inadequacy of the time limit is a criticism of Parliament rather than an argument on construction. The latitude allowed to an aggrieved person is wide enough. Finally, there was no need to refer to a certificate under Part III.

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[16] (1903) 67 J.P. 457; 20 T.L.R. 22.

[17] [1929] 1 K.B. 619; 45 T.L.R. 345.

[18] [1931] A.C. 494; 47 T.L.R. 337.

[19] [1947] W.N. 189.

Lazarus Estates Ltd. v. *Beasley*[22] is distinguishable from the present case: see *per* Parker L.J.[23] That is an important case. [Reference was also made to section 11 (5) of the Development and Road Improvement Funds Act, 1909.]

Rodger Winn following. As to the procedure on compulsory purchase, see section 175 of Halsbury's Laws of England, 3rd ed., vol. X, p. 60, para. 97, and p. 63, para. 102. Once a compulsory purchase order is made the landowner no longer has any right to retain the land. If fraud occurs thereafter, his rights in respect of that subsequent fraud sound in money.

As to establishing want of bona fides, see *Errington* v. *Metropolitan District Railway Co.*[24]

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[20] [1926] Ch. 66, 90–91; 42 T.L.R. 107.

[21] [1955] 1 Q.B. 103, 113, 129.

[22] [1956] 1 Q.B. 702.

[23] Ibid. 722.

[24] (1882) 19 Ch.D. 559, 571.

If any suggestion of bad faith was made against the notice to treat on the ground that the land was not needed for housing, the best answer is that the houses have in fact been erected.

The manifest purpose of providing for finality in statutes relating to compulsory acquisition differentiates these provisions from provisions as to limitation between private litigants.

In so far as a notice to treat might purport to acquire land for a purpose not genuinely intended, there would be no power to appropriate the land to another purpose without the consent of the Minister. [*Wilkinson* v. *Barking Corporation*[25] was referred to.]

Roy Wilson Q.C. in reply. Admittedly Parliament can enact whatever it likes. It could enact that statutory powers might be abused or that if they were abused, there should be no legal redress. But, short of an express provision to that effect, no statute would be so construed as to deprive the citizen of redress in respect of fraud. The respondents do not challenge the proposition that statutory powers must be exercised bona fide. But unless that means that powers exercised mala fide are invalidly exercised, how is one to construe " must "? If a duty is imposed, is it a duty of imperfect obligation? The respondents are merely paying lip service to a principle which has hitherto imposed a legal obligation and not simply a moral duty. If the existence of bad faith were brought to the attention of the Minister, there is no power for him to cancel his confirmation of a compulsory purchase order. If the respondents' argument is right, there is no way in which an exercise of a power in bad faith can be brought to account or in which a person fraudulently expropriated can get his land back. The proposition that powers must be exercised bona fide would be unsupported by any sanction.

Rex v. *Minister of Health; Ex parte Yaffe*[26] and *Minister of Health* v. *Rex* (*on the prosecution of Yaffe*)[27] are entirely consistent with the appellant's submission. The court was not addressing its mind to mala fides but to ultra vires. That keeps within the proposition that so long as the Minister acts within his discretion (which must be exercised bona fide), the courts will not interfere. The respondents said that if the local authority did not use the land as it said it would, " appropriate action could be " taken." But, whatever action was taken, it would be of no use to the dispossessed owner.

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[25] [1948] 1 K.B. 721; 64 T.L.R. 230; [1948] 1 All E.R. 564.

[26] [1930] 2 K.B. 98, 144, 145, 146; 46 T.L.R. 178.

[27] [1931] A.C. 494, 533.

For the respondents it was said that great inconvenience would be caused if the paragraph did not bar all actions and if they might be brought at any time within the Statute of Limitations. But although, over a long period of years, the opinion of the courts has been unanimous that mala fides vitiates the exercise of a power, hardly any cases have in fact been brought. It is less serious that a local authority should be dispossessed of property which it has acquired in bad faith than that the person aggrieved should have no remedy for its fraudulent conduct. Davies on Planning, Compulsory Purchase and Rating Law, at p. 187, gives the order of events in a compulsory purchase, showing that conveyance is the last stage. Suppose there was a valid compulsory purchase order but the local authority gave notice to treat, meaning to provide false figures for the valuation. There would be a clear right to set aside the whole matter because of the abuse of statutory power. Thus the possibility of the inconvenience suggested would not be avoided.

Up to 1925 the Acts referred to on behalf of the Crown say nothing novel in the matter of the total exclusion of the jurisdiction of the courts: see section 297 of the Public Health Act, 1875. The Housing, Town Planning, etc., Act, 1909, for the first time dispenses with a confirming Act and the legislature delegates the confirmation of a compulsory purchase: see also section 64 and Schedule III of the Housing Act, 1925. But such confirmation has no intention of dealing with questions of mala fides and no conclusions can be drawn from this legislation in relation to that.

The proposition in *Wilkinson* v. *Barking Corporation* [28] cannot be doubted because in that case the jurisdiction was vested by statute in another tribunal and not in the High Court, but paragraph 15 is relied on by the respondents as a time provision.

Here one is primarily concerned with a real question of principle, whether or not the courts can consider the question of mala fides at all. From the beginning it has been treated both as a question of jurisdiction and of substance. The practical question is whether or not the appellant's writ is to be set aside. If the respondents are right, nothing more will be heard of this action on the ground that the courts have no jurisdiction to deal with it. Even to allow the action to proceed against Pywell alone would leave the appellant with a very limited remedy.

As to the intention to perform a public duty, as distinct from actually performing it, see Preston and Newsom on Limitation of Actions, 3rd ed., p. 197.

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[28] [1948] 1 K.B. 721.

Throughout the whole field of construction one finds the general principle that if one is dealing with general words which might either apply to things done bona fide or things done mala fide, they will be taken to exclude fraud: see Halsbury's Laws of England, 3rd ed., vol. III, p. 456, para. 870. It is an overriding consideration that paragraphs 15 and 16 of this Schedule should only be construed to cover cases of fraud if that appears to be the intention of the legislature, but that is not the case, since such an intention must be expressed in the plainest terms, while here the indications are all the other way.

If the House is against the appellant on the rest of the case, the action should be kept alive against Pywell.

Rodger Winn. On the last point the structure of the case has always been that there was bad faith rendering the order invalid. If the case against Pywell had been separate (e.g., if he had been said to have procured a valid order by a tortiously fraudulent act), the matter would have been different. But the case against him should stand or fall with the case against the other respondents.

Their Lordships took time for consideration.

March 26. VISCOUNT SIMONDS stated the facts and continued: My Lords, I must now turn to a consideration of the provisions of the Acquisition of Land (Authorization Procedure) Act, 1946. But I must preface it by two observations. First, I would remind your Lordships that the Act is applicable to a great variety of transactions, in which a large or small area of land is required by a national or local authority for public purposes, and, secondly, I do not forget that this Act is the last example of a long series of similar enactments, in which by one provision or another Parliament has sought to give finality and security from challenge to compulsory acquisitions of land. I have not myself been able to get any assistance from a comparison of the language of this enactment with that of its predecessors. Counsel on both sides craved such a comparison in aid. I shall be doing no injustice if I say it helps neither of them and base my opinion on the very words of the Act.

Section 1 (1) of the Act enacts that: "The authorization of "any compulsory purchase of land—(*a*) by a local authority "where, apart from this Act, power to authorize the authority to "purchase land compulsorily is conferred by or under any enact- "ment contained in a public general Act and in force immediately "before the commencement of this Act, other than any enact-"ment specified in subsection (4) of this section; (*b*) . . . shall, "subject to the provisions of this and the next following section, "be conferred by an order (in this Act referred to as a 'com-"'pulsory purchase order') in accordance with the provisions of "Schedule I to this Act (being provisions which, subject to "certain adaptations, modifications and exceptions, correspond "with provisions as to the authorization of the compulsory "purchase of land of the Local Government Act, 1933)." Subsection (2) of section 1 made provision for a special procedure in relation to the purchase of land to which Part III of Schedule I of the Act applied. This does not affect the land the subject of this action. It has been observed that the language of subsection (1) is somewhat involved, but there appears to be no doubt that a local authority authorizes its own authority to make a purchase.

I need refer to no other section of the Act and come to Schedule I, which, after making the familiar provisions in regard to advertisements, notices to persons affected, objections, local inquiry and confirmation, provides as follows by paragraphs 15 and 16 of Part IV:

"15. (1) If any person aggrieved by a compulsory purchase "order desires to question the validity thereof, or of any provision "contained therein, on the ground that the authorization of a "compulsory purchase thereby granted is not empowered to be "granted under this Act or any such enactment as is mentioned "in subsection (1) of section 1 of this Act, or if any person "aggrieved by a compulsory purchase order or a certificate under "Part III of this Schedule desires to question the validity "thereof on the ground that any requirement of this Act or of "any regulation made thereunder has not been complied with "in relation to the order or certificate, he may, within six weeks "from the date on which notice of the confirmation or making "of the order or of the giving of the certificate is first published "in accordance with the provisions of this Schedule in that "behalf, make an application to the High Court, and on any such "application the court—(*a*) may by interim order suspend the "operation of the compulsory purchase order or any provision "contained therein, or of the certificate, either generally or in "so far as it affects any property of the applicant, until the final "determination of the proceedings; (*b*) if satisfied that the "authorization granted by the compulsory purchase order is not "empowered to be granted as aforesaid, or that the interests of "the applicant have been substantially prejudiced by any requirement of this Schedule or of any regulation made thereunder "not having been complied with, may quash the compulsory "purchase order or any provision contained therein, or the "certificate, either generally or in so far as it affects any property "of the applicant."

"16. Subject to the provisions of the last foregoing paragraph, a compulsory purchase order or a certificate under Part "III of this Schedule shall not, either before or after it has been "confirmed, made or given, be questioned in any legal proceedings whatsoever, and shall become operative on the date on "which notice is first published as mentioned in the last foregoing "paragraph."

I will dispose at once of the short point of construction which was the main topic of argument and judgment in the Court of Appeal. It was urged that paragraph 16 was limited in its application to cases of compulsory acquisition of land to which Part III of the Schedule referred. Briefly, it was said that the words " under Part III of this Schedule " qualified not only " a "certificate " but also " a compulsory purchase order." It is clear to me not only that, for the reasons given by Parker L.J., such a construction would produce results so absurd that it should be avoided if fairly avoidable, but also that it is grammatically unsound in that the use of the indefinite article where it occurs for the second time indicates that the words " under Part III " qualify only the words " a certificate."

In this House a more serious argument was developed. It was that, as the compulsory purchase order was challenged on the ground that it had been made and confirmed " wrongfully " and " in bad faith," paragraph 16 had no application. It was said that that paragraph, however general its language, must be construed so as not to oust the jurisdiction of the court where the good faith of the local authority or the Ministry was impugned and put in issue. Counsel for the appellant made his submission very clear. It was that where the words " compulsory purchase "order " occur in these paragraphs they are to be read as if the words " made in good faith " were added to them.

My Lords, I think that anyone bred in the tradition of the law is likely to regard with little sympathy legislative provisions for ousting the jurisdiction of the court, whether in order that the subject may be deprived altogether of remedy or in order that his grievance may be remitted to some other tribunal. But it is our plain duty to give the words of an Act their proper meaning and, for my part, I find it quite impossible to qualify the words of the paragraph in the manner suggested. It may be that the legislature had not in mind the possibility of an order being made by a local authority in bad faith or even the possibility of an order made in good faith being mistakenly, capriciously or wantonly challenged. This is a matter of speculation. What is abundantly clear is that words are used which are wide enough to cover any kind of challenge which any aggrieved person may think fit to make. I cannot think of any wider words. Any addition would be mere tautology. But, it is said, let those general words be given their full scope and effect, yet they are not applicable to an order made in bad faith. But, my Lords, no one can suppose that an order bears upon its face the evidence of bad faith. It cannot be predicated of any order that it has been made in bad faith until it has been tested in legal proceedings, and it is just that test which paragraph 16 bars. How, then, can it be said that any qualification can be introduced to limit the meaning of the words? What else can "compulsory "purchase order" mean but an act apparently valid in the law, formally authorized, made, and confirmed?

It was urged by counsel for the appellant that there is a deep-rooted principle that the legislature cannot be assumed to oust the jurisdiction of the court, particularly where fraud is alleged, except by clear words, and a number of cases were cited in which the court has asserted its jurisdiction to examine into an alleged abuse of statutory power and, if necessary, correct it. Reference was made, too, to Maxwell on the Interpretation of Statutes to support the view, broadly stated, that a statute is, if possible, so to be construed as to avoid injustice. My Lords, I do not refer in detail to these authorities only because it appears to me that they do not override the first of all principles of construction, that plain words must be given their plain meaning. There is nothing ambiguous about paragraph 16; there is no alternative construction that can be given to it; there is in fact no justification for the introduction of limiting words such as "if "made in good faith," and there is the less reason for doing so when those words would have the effect of depriving the express words "in any legal proceedings whatsoever" of their full meaning and content.

I have examined paragraph 16 by itself without reference to paragraph 15. But paragraph 16 opens with the words "Subject "to the provisions of the last foregoing paragraph." It is necessary, therefore, to see whether the earlier has any bearing upon the meaning of the later paragraph. I think that it has not, for, in my opinion, the width or narrowness of the grounds of challenge permitted by paragraph 15 does not touch the construction of paragraph 16. Be they wide or be they narrow, it is subject to them that the general bar to legal proceedings is imposed. I am, therefore, reluctant to express a final opinion upon a matter much agitated at your Lordships' bar, whether the words "is not "empowered" were apt to include a challenge not only on the ground of vires but also on the ground of bad faith or any other ground which would justify the court in setting aside a purported exercise of a statutory power. The inclination of my opinion is that they are, but I would prefer to keep the question open until it arises in a case where the answer will be decisive, as it is not here.

I come, then, to the conclusion that the court cannot entertain this action so far as it impugns the validity of the compulsory purchase order, and it is no part of my present duty to attack or defend such a provision of an Act of Parliament. But two things may, I think, fairly be said. First, if the validity of such an order is open to challenge at any time within the period allowed by the ordinary Statute of Limitations with the consequence that it and all that has been done under it over a period of many years may be set aside, it is not perhaps unreasonable that Parliament should have thought fit to impose an absolute bar to proceedings even at the risk of some injustice to individuals. Secondly, the injustice may not be so great as might appear. For the bad faith or fraud upon which an aggrieved person relies is that of individuals, and this very case shows that, even if the validity of the order cannot be questioned and he cannot recover the land that has been taken from him, yet he may have a remedy in damages against those individuals. Here the appellant by her writ claims against the personal defendant a declaration that he knowingly acted wrongfully and in bad faith in procuring the order and its confirmation, and damages, and that is a claim which the court clearly has jurisdiction to entertain. I am far from saying that the claim has any merit. Of that I know nothing. But because the court can entertain it, I think that the Court of Appeal, to whose attention this particular aspect of the case appears not to have been called, were wrong in striking out the whole writ and I propose that their order should be varied by striking out the defendants other than Mr. Pywell and the claims other than claims 3, 5, 6 and 7.

Against Mr. Pywell the action may proceed but upon the footing that the validity of the order cannot be questioned.

There will be no order as to costs.

LORD MORTON OF HENRYTON stated the facts and continued: My Lords, I think there can be no doubt that the respondents were never entitled to have the writ set aside so far as it claims relief against the respondent Pywell. The relief claimed by paragraph 3 of the writ and the further relief claimed by paragraphs 5, 6 and 7, in so far as that relief affects the respondent Pywell, in no way call in question the validity of the compulsory purchase order of August 26, 1948, or of its confirmation. It is simply alleged, as against Mr. Pywell personally, that he knowingly acted wrongfully and in bad faith in procuring the order and the confirmation thereof. It is equally clear that claims 1, 2 and 4 do put in issue the validity of the order, and it would appear that this distinction between the claim against Mr. Pywell and the other claims was overlooked until the appeal was being argued in this House. No such point was taken in any of the courts below, or in the appellant's reasons, but it is clear that the appellant is entitled to proceed against Mr. Pywell, whatever view your Lordships take on the main question arising on this appeal, namely, whether paragraph 16 of Part IV of Schedule I to the Act of 1946 deprives this House, and all courts, of jurisdiction to hear and determine this action, so far as it relates to the first and third respondents. The relevant portions of the Act of 1946 are as follows:—

By section 1 (1) the Act makes provision for the compulsory purchase of certain lands in the following terms: "The authorization of any compulsory purchase of land—(*a*) by a local "authority where, apart from this Act, power to authorize the "authority to purchase land compulsorily is conferred by or under "any enactment contained in a public general Act and in force "immediately before the commencement of this Act, other than "any enactment specified in subsection (4) of this section; ". . . shall, subject to the provisions of this and the next "following section, be conferred by an order (in this Act referred "to as a 'compulsory purchase order') in accordance with the "provisions of Schedule I to this Act (being provisions which, "subject to certain adaptations, modifications and exceptions, "correspond with provisions as to the authorization of the "compulsory purchase of land of the Local Government Act, "1933)."

Section 1 (2) of the said Act provides that a special procedure set out in Part III of Schedule I to the Act shall be followed in compulsory acquisition of such land as falls within its scope, viz.:—"(*a*) which is the property of a local authority or which "has been acquired by statutory undertakers for the purposes of "their undertaking, (*b*) forming part of a common, open space "or fuel or field garden allotment, or held inalienably by the "National Trust, or (*c*) being, or being the site of, an ancient "monument or other object or archaeological interest." It is plain that the land, the subject of this action, was not land affected by subsection (2) of section 1.

Paragraphs 15 and 16 of Part IV of Schedule I to the Act of 1946 are as follows: [His Lordship read the paragraphs and continued:] For the sake of brevity I shall hereafter refer to the paragraphs just quoted simply as "paragraph 15" or "paragraph 16."

Mr. Roy Wilson, for the appellant, puts forward propositions which I summarize as follows: (1) Paragraph 15 gives no opportunity to a person aggrieved to question the validity of a compulsory purchase order on the ground that it was made or confirmed in bad faith. (2) Although, prima facie, paragraph 16 excludes the jurisdiction of the court in all cases, subject only to the provision of paragraph 15, it is inconceivable that the legislature can have intended wholly to exclude all courts from hearing and determining an allegation that such an order was made in bad faith. (3) Therefore, paragraph 16 should be read as applying only to an order or a certificate made in good faith. In support of his second and third propositions, Mr. Wilson relied upon a general principle stated in the tenth edition of Maxwell on the Interpretation of Statutes, on observations made in a number of cases dealing with statutory powers, and on the case of *Calder* v. *Halket.*[1] The Attorney-General, on behalf of the respondents, contends that the opportunity of objection given by paragraph 15 extends to cases where bad faith is alleged, but, whether or not this is so, if the person aggrieved fails to apply to the court within the six weeks' period there mentioned, the jurisdiction of the court is completely ousted by paragraph 16, the terms whereof are unambiguous.

My Lords, I accept Mr. Wilson's first proposition. I cannot construe paragraph 15 as covering a case in which all the requirements expressly laid down by statute have been observed, but the person aggrieved has discovered that in carrying out the steps laid down by statute the authority has been actuated by improper motives. It is to be observed that both in the earlier and in the later part of paragraph 15 there is only one ground upon which the validity of the order can be questioned. In the earlier part that ground is "that the authorization of a compulsory purchase "thereby granted is not empowered to be granted under this Act "or any such enactment as is mentioned in subsection (1) of "section 1 of this Act." In the later part it is "that any "requirement of this Act or of any regulation made thereunder "has not been complied with in relation to the order or "certificate." These words seem to me to restrict the complainant to alleging non-compliance with some requirement to be found in the relevant statutes or regulations. If paragraph 15 had been intended to apply to cases of bad faith, surely the restrictive words "on the ground that," etc., would have been left out in both parts. If, however, the words of paragraph 15 leave the point in any doubt, that doubt is removed, to my mind, by comparing the words of section 162 (1) of the Local Government Act, 1933, with the words of paragraph 15. It will be remembered that in section 1 (1) of the Act of 1946, already quoted, the provisions of Schedule I to that Act (which provisions include paragraph 15) are described as "provisions which, subject "to certain adaptations, modifications and exceptions, correspond "with provisions as to the authorization of the compulsory "purchase of land of the Local Government Act, 1933." The provision in the Act of 1933 which corresponds to paragraph 15 is contained in section 162 (1) which begins as follows: "If any "person aggrieved by a compulsory purchase order . . . desires to "question its validity, he may, within two months after the "publication of the notice of confirmation . . . make an application for the purpose to the High Court," etc. One "modification" of this provision which is made by paragraph 15 consists in altering the wide words, "desires to question its "validity," to the strictly limited words already quoted. It is, I think, inconceivable that, if the legislature had intended paragraph 15 to cover cases where bad faith was alleged, it would have made this striking alteration in the language of section 162 of the 1933 Act. I would add that if paragraph 15 had been intended to cover such cases, there would seem to be no good reason why the earlier part thereof should not have been applied to a certificate as well as to an order, since the later part applies to both. The reason for this difference was explained by Parker L.J. in the Court of Appeal, and I agree with his explanation; but the difference remains wholly unexplained if paragraph 15 covers cases where bad faith is alleged.

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[1] (1840) 3 Moo.P.C. 28.

My Lords, having accepted Mr. Wilson's first proposition, for the reasons I have stated, I reject his second and third propositions, on the short and simple ground that the words of paragraph 16 are clear, and deprive all courts of any jurisdiction to try the issues raised by paragraphs 1, 2 and 4 of the writ, whereby the appellant undoubtedly seeks to question the validity of the order of August 26, 1948.

Turning first to counsel's second proposition, it does not seem to me inconceivable, though it does seem surprising, that the legislature should have intended to make it impossible for anyone to question in any court the validity of a compulsory purchase
2.1 order on the ground that it was made in bad faith. It may have been thought that the procedure which has to be followed before such an order is made and confirmed affords sufficient opportunity
2.2 for allegations of bad faith to be ventilated, and it may have been thought essential, if building schemes were to be carried out, that persons alleging bad faith in the making of an order, after the order has been made, should be limited to claims sounding in damages against the persons who, in bad faith, caused or procured the order to be made. The present action started nearly six years after the order now in question was made and confirmed, and illustrates the difficulty which might arise if no such limit were imposed, since houses have already been erected on the land which was the subject of the order.

I fully realize that certain strange results follow if my construction of paragraphs 15 and 16 is correct. For instance, a compulsory purchase order is made whereby a man is compelled to sell a house which has been his home, and the home of his family, for many years. After the order is made, evidence comes into his hands which shows that the order was made because the local district council wished to gratify a grudge against him, or for other reasons even more sinister. That man is for ever precluded from going to any court to have the order set aside. However, it is, of course, within the powers of Parliament to achieve this result, and, in my opinion, it has been achieved by paragraphs 15 and 16. In making this comment I am not, of course, casting any reflection upon any of the respondents to this appeal.

Effect can only be given to counsel's third proposition if some words are read into paragraph 16. Counsel suggested that the words " made in good faith " should be read in after " order " and also after "certificate." I cannot accept this suggestion. It would be impossible to predicate of any order or certificate that it was made in good faith until the court had inquired into the matter, and that is just what paragraph 16 prohibits. Mr. Wilson relied upon certain passages in the tenth edition of Maxwell on the Interpretation of Statutes, and especially on the following passage, which appears on p. 122, and also appeared, in substantially the same terms, in the first edition published in 1875: "Enactments which confer powers are so construed as to "meet all attempts to abuse them, either by exercising them in "cases not intended by the statute, or by refusing to exercise "them when the occasion for their exercise has arisen. Though "the act done was ostensibly in execution of the statutory power "and within its letter, it would nevertheless be held not to "come within the power if done otherwise than honestly and in "the spirit of the enactment." My Lords, this is a well-known principle; it is illustrated by many cases, and Mr. Wilson made an excellent selection of them, beginning with *Ex parte Cowan.*[2] In my opinion, however, neither the passage in Maxwell nor this line of cases assists your Lordships in construing paragraph 16. That paragraph does not confer a power. If it did, I should apply the principle stated in Maxwell without any hesitation. What the paragraph does is to enact, in terms which seem to me very clear, that when a certain type of order or certificate has been made, it shall not be questioned in any court, except in the limited type of case and for the limited period specified in paragraph 15.

Mr. Wilson also relied upon the case of *Calder* v. *Halket.*[3] In that case the Judicial Committee had to construe section 24 of the Act 21 Geo. 3, c. 70, which was in the following terms: "And whereas it is reasonable to render the provincial magis- "trates, as well natives as British subjects, more safe in the "execution of their office, be it enacted, That no action for wrong "or injury shall lie in the Supreme Court, against any person "whatsoever exercising a judicial office in the country courts, "for any judgment, decree, or order of the said court, nor against "any person for any act done by or in virtue of the order of the "said court."

Parke B., delivering the judgment of the Board, said[4]: "Three meanings may be attributed to this clause. *First.* It may "mean that no action should lie against one exercising a judicial

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[2] (1867) L.R. 2 Ch. 563.
[3] 3 Moo.P.C. 28.
[4] Ibid. 74–75.

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" office, in the country courts, for any judgment, decree, or order " of the court, whether in a matter in which the court had a " jurisdiction or not, or whether the judge wilfully and knowingly " gave judgment or made an order in a matter out of his juris- " diction or not; so that the fact of the existence of a judgment, " decree, or order, should preclude all inquiry. *Secondly*. It " may mean to protect the judge only where he gives judgment, " or makes an order, in the bona fide exercise of his office, and " under the belief of his having jurisdiction, though he may not " have any. *Thirdly*. The object may have been to put the " judges of the native courts on the footing of judges of the " superior courts of record, or courts having similar jurisdiction " to the native courts here, protecting them from actions for " things done within their jurisdiction, though erroneously or " irregularly done, but leaving them liable for things done wholly " without jurisdiction. It seems to us, that the first of these " constructions is inadmissible. It never could have been " intended to give such unlimited power to the judges of the " native courts, and reason points out that the general words of " the clause must be qualified in the manner stated in one of the " two latter modes of construction. We think that the third is " the right mode, and that the true meaning of the section in " question was to put the judges of native courts of justice on " the same footing as those of English courts of similar jurisdic- " tion. There seems no reason why they should be more or less " protected than English judges of general or limited jurisdiction, " under the like circumstances."

In that case it was possible, as a matter of construction, to read in the words " made within its jurisdiction " after the words " the said court," and the decision may have been justified, having regard to the context and the surrounding circumstances; but it is impossible to read the words " made in good faith " into paragraph 16, for the reasons I have already stated. I think that the decision in *Calder* v. *Halket*[5] would have been different if the section had read, " No judgment, decree or order of the said " court shall be questioned in any legal proceedings whatsoever." Such words would, I think, clearly " preclude all inquiry " by preventing any complainant from raising the question whether the order had or had not been made without jurisdiction.

The only other way of giving effect to counsel's third proposition would be to insert after the word " whatsoever " in paragraph 16 some such words as " unless it is alleged that the

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[5] 3 Moo.P.C. 28.

"order or certificate was made in bad faith"; but I can find no justification for inserting these words. To do so would be legislation, not interpretation. For these reasons, I am of opinion that paragraph 16 operates to oust the jurisdiction of the courts in the present case, except in regard to the claims against Mr. Pywell. I should add that Mr. Collier, junior counsel for the appellant, submitted that in paragraph 16 the words "under "Part III of this Schedule" qualify "a compulsory purchase "order" as well as "a certificate," and as the order in the present case was not made under Part III of Schedule I, paragraph 16 has no application to the present case. That submission was rejected by the Court of Appeal, and I shall only say that, in my opinion, it was rightly rejected, for the reasons given by Parker L.J.

I would allow the writ in this action to stand only in so far as it claims relief against the respondent Pywell by claims 3, 5, 6 and 7. The writ should, in my view, be set aside for want of jurisdiction in so far as it claims relief against the other respondents. The appeal should, therefore, be allowed to the extent just mentioned.

LORD REID. My Lords, in this action the appellant sues the East Elloe Rural District Council and the Ministry of Health, now the Ministry of Housing and Local Government, and seeks declarations that a compulsory purchase order made by that local authority and confirmed by the Minister was made and confirmed wrongfully and in bad faith. The appellant also seeks consequential relief. The writ of summons has been set aside before a statement of claim was lodged, and so we do not know the nature of the bad faith alleged. But the argument for the respondents is that it matters not how serious the bad faith might be: even if conspiracy and corruption were involved, the action could not proceed because Parliament has deprived the courts of jurisdiction to entertain it.

The jurisdiction of the courts is said to be ousted by two paragraphs of Schedule I to the Acquisition of Land (Authorization Procedure) Act, 1946. Those paragraphs are as follows: [His Lordship read paragraphs 15 and 16 and continued:]

Compulsory purchase orders can be made under a number of different statutes, and before 1946 there was no uniform procedure: for example, the procedure under the Housing Act, 1936, differed in some respects from the procedure under the Local Government Act, 1933. Section 1 (1) of the 1946 Act provides for the authorization of any compulsory purchase by a local authority being confirmed by order in accordance with the provisions of Schedule I " (being provisions which, subject to certain " adaptations, modifications and exceptions, correspond with provisions as to the authorization of the compulsory purchase of " land of the Local Government Act, 1933)." I shall have to refer to these words later. The provisions of the Act of 1946 now apply to a wide variety of orders made by many different types of authority, and the question how far the jurisdiction of the courts has been ousted by this Act is, therefore, of very great importance. The order by which the appellant is aggrieved was made under the Housing Act, 1936, but nothing turns on that.

Paragraph 15 of Schedule I allows the validity of an order to be questioned on two grounds, first, that the authorization of the compulsory purchase " is not empowered to be granted " under the Act under which the order is made, and, secondly, that any requirement of the 1946 Act has not been complied with. In either case he may make application to the court within six weeks from publication of confirmation of the order. Paragraph 16 provides that save as aforesaid a compulsory purchase order shall not be questioned in any legal proceedings whatsoever either before or after it has been confirmed.

If the words of these paragraphs are held to have their ordinary meanings, then an order can never be questioned or attacked in any court on the ground that it has been obtained by corrupt or fraudulent means, no matter how serious the corruption or how wide the conspiracy by which it has been obtained. Admittedly no other tribunal is given jurisdiction to deal with such a case, and the Minister has no power to act if, after he has confirmed an order, it were found that the making of the order had been due to corruption or malice. The only reason suggested for depriving the subject of redress in such a case is administrative convenience, and I find it necessary to examine these paragraphs narrowly to see whether I am forced to reach the conclusion that that must be held to have been the intention of Parliament. I may say at once that I have found nothing in the Act beyond the phraseology of these two paragraphs to indicate that Parliament had such an intention. I shall, therefore, examine the phraseology of these paragraphs to see whether either of them is susceptible of an interpretation which would avoid that result.

I take a case like the present case, where the purpose of the acquisition of the land is plainly stated in the order and is plainly intra vires and where all the required steps of procedure have been duly taken, and I must first examine paragraph 15 to see whether the present appellant could have questioned the order on any ground of bad faith, malice, corruption or conspiracy if she had raised her action within six weeks of the order being confirmed. It is not said that this could have been brought within the second of the grounds set out in paragraph 15, but it is argued that it could be brought within the first because an authorization obtained in bad faith is not "empowered to be "granted."

I have quoted the passage in section 1 of the 1946 Act, which states that the provisions of its First Schedule correspond to provisions of the 1933 Act subject to adaptations and modifications, and I therefore begin by examining the provisions of the earlier Act which correspond to paragraphs 15 and 16 of Schedule I. Those provisions are contained in section 162 of the 1933 Act. Subsection (1) provides, with regard to a compulsory purchase order, that if a person aggrieved "desires to question its validity, "he may, within two months after the publication of the notice "of confirmation . . . make an application for the purpose to the "High Court." The court may then quash the order, but when the invalidity arises from procedural provisions, the court must be satisfied that the interests of the applicant have been substantially prejudiced. Subsection (2) provides that, subject to the provisions which I have mentioned, an order shall not either before or after its confirmation, be questioned by prohibition or certiorari or in any legal proceedings.

The 1933 Act does not in any way restrict the grounds on which a person may question the validity of an order, but the 1946 Act specifies two grounds. I can see no other possible reason for this change, and the more elaborate drafting which it entails, than an intention to limit the grounds on which a person aggrieved can make application to the court, and in order to determine how far the 1946 Act has limited the jurisdiction of the courts I must see what were the grounds on which the court could give relief under the ordinary law or the 1933 Act. I think that in the past there has been some confusion about this, and I fear that I must try as best I can to unravel the matter. It seems to me that there were four grounds on which the courts could give relief. First, informality of procedure; where, for example, some essential step in procedure had been omitted. Secondly, ultra vires in the sense that what was authorized by the order went beyond what was authorized by the Act under which it was made. Thirdly, misuse of power in bona fide. And, fourthly, misuse of power in mala fide. In the last two classes the order is intra vires in the sense that what it authorizes to be done is within the scope of the Act under which it is made, and every essential step in procedure may have been taken: what is challenged is something which lies behind the making of the order. I separate these two classes for this reason. There have been few cases where actual bad faith has even been alleged, but in the numerous cases where misuse of power has been alleged judges have been careful to point out that no question of bad faith was involved and that bad faith stands in a class by itself.

Misuse of power covers a wide variety of cases, and I am relieved from considering at length what amounts to misuse of power in bona fide because I agree with the analysis made by Lord Greene M.R. in *Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation.*[6] There the local authority had power to grant licences for cinema performances "subject to "such conditions as the authority think fit to impose." They allowed Sunday performances subject to the condition that no child should be admitted and were held entitled to do this. I quote what seem to me the leading passages in Lord Greene's judgment. He said [7]: "The exercise of such a discretion must "be a real exercise of the discretion. If, in the statute con-"ferring the discretion, there is to be found expressly or by impli-"cation matters which the authority exercising the discretion "ought to have regard to, then in exercising the discretion it "must have regard to those matters. Conversely, if the nature "of the subject-matter and the general interpretation of the "Act make it clear that certain matters would not be "germane to the matter in question, the authority must dis-"regard these irrelevant collateral matters . . .[8] a person "entrusted with a discretion must, so to speak, direct himself "properly in law. He must call his own attention to the "matters which he is bound to consider. He must exclude from "his consideration matters which are irrelevant to what he has "to consider. If he does not obey those rules, he may truly be "said, and often is said, to be acting 'unreasonably' . . .[9] It "is true to say that, if a decision on a competent matter is so "unreasonable that no reasonable authority could ever have "come to it, then the courts can interfere. That, I think, is quite

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[6] [1948] 1 K.B. 223; 63 T.L.R. 623; [1947] 2 All E.R. 680.

[7] [1948] 1 K.B. 223, 228.

[8] Ibid. 229.

[9] Ibid. 230.

"right: but to prove a case of that kind would require something overwhelming . . .[10] The court is entitled to investigate "the action of the local authority with a view to seeing whether "they have taken into account matters which they ought not to "take into account, or, conversely, have refused to take into "account or neglected to take into account matters which they "ought to take into account. Once that question is answered "in favour of the local authority, it may still be possible to say "that, although the local authority have kept within the four "corners of the matters which they ought to consider, they have "nevertheless come to a conclusion so unreasonable that no "reasonable authority could ever have come to it. In such a "case, again, I think the court can interfere. The power of the "court to interfere in each case is not an appellate authority "to override a decision of the local authority, but as a judicial "authority which is concerned, and concerned only, to see "whether the local authority have contravened the law by acting "in excess of the powers which Parliament has confided in them." None of those cases need involve mala fides. A local authority may have had regard to quite irrelevant considerations or may have acted quite unreasonably but yet be entirely innocent of dishonesty or malice.

I can draw no other conclusion from the form in which paragraph 15 is now enacted than that Parliament intended to exclude from the scope of this paragraph the whole class of cases referred to in the passages which I quoted. No doubt in one sense it might be said that in none of these cases is authority "empowered to be granted," but that would be a strained and unnatural reading of these words only to be accepted if there were in the Act some clear indication requiring it. But, to my mind, all the indications are the other way, and this part of the paragraph only refers to cases of ultra vires in the narrow sense in which I have used it.

If other cases of misuse of power in bona fide are excluded, can a distinction be made where mala fides is in question? As I shall explain when I come to paragraph 16, I am of opinion that cases involving mala fides are in a special position in that mere general words will not deprive the court of jurisdiction to deal with them, and, if that is so, then no question would arise under paragraph 15. But, if I am wrong about cases of mala fides being in this special position, I do not see how there can be a distinction under paragraph 15 between cases of bona fide and mala fide misuse of power. I can see nothing to indicate any intention to that effect, and if Parliament intended to treat bad faith as a special case it would be very strange to introduce the exception here. The time limit under paragraph 15 is six weeks, which is appropriate for grounds which appear from the terms of the order but not appropriate for grounds based on facts lying behind the order which may not be discoverable for some time after it is confirmed; and I find another strong indication that the first ground of challenge was not intended to apply to such cases in the fact that that ground is not available to a person aggrieved by the granting of a certificate: only the second ground is available to him. This is intelligible if the first ground only applies to ultra vires because I cannot see how a certificate could be ultra vires. But, if the first ground was intended to apply where mala fides is alleged, I cannot imagine any reason why it was not also made available when a certificate is challenged.

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[10] [1948] 1 K.B. 233–234.

In my view, the question whether authority is empowered to be granted is intended to be capable of immediate answer: if it can depend on facts lying behind the order, then neither the Minister nor the owner could know for certain at the time of confirmation whether any order is empowered to be granted or not, because facts showing misuse of power might subsequently emerge. Accordingly, in my opinion, the appellant could not have brought her case within paragraph 15, even if she had raised it immediately after the order was confirmed.

I turn to paragraph 16. Not only does it prevent recourse to the court after six weeks in cases to which paragraph 15 does apply, but, on the face of it, it prevents any recourse to the court at all in cases to which paragraph 15 does not apply. It uses words which are general and emphatic, and, to my mind, the question is whether this use of general words necessarily leads to the conclusion that the jurisdiction of the court is entirely excluded in all cases of misuse of powers in mala fide where those acting in mala fide have been careful to see that the procedure was in order and the authority granted by the order was within the scope of the Act under which it was made. A person deliberately acting in bad faith would naturally be careful to do this. In my judgment, paragraph 16 is clearly intended to exclude, and does exclude entirely, all cases of misuse of power in bona fide. But does it also exclude the small minority of cases where deliberate dishonesty, corruption or malice is involved? In every class of case that I can think of the courts have always held that general

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words are not to be read as enabling a deliberate wrongdoer to take advantage of his own dishonesty. Are the principles of statutory construction so rigid that these general words must be so read here? Of course, if there were any other indications in the statute of such an intention beyond the mere generality of the words that would be conclusive: but I can find none.

There are many cases where general words in a statute are given a limited meaning. That is done, not only when there is something in the statute itself which requires it, but also where to give general words their apparent meaning would lead to conflict with some fundamental principle. Where there is ample scope for the words to operate without any such conflict it may very well be that the draftsman did not have in mind and Parliament did not realize that the words were so wide that in some few cases they could operate to subvert a fundamental principle. In general, of course, the intention of Parliament can only be inferred from the words of the statute, but it appears to me to be well established in certain cases that, without some specific indication of an intention to do so, the mere generality of words used will not be regarded as sufficient to show an intention to depart from fundamental principles. So, general words by themselves do not bind the Crown, they are limited so as not to conflict with international law, they are commonly read so as to avoid retrospective infringement of rights, and it appears to me that they can equally well be read so as not to deprive the court of jurisdiction where bad faith is involved. If authority be needed for reading general words so as not to deprive the court of jurisdiction in such a case, I find it in *Calder* v. *Halket*,[11] where general words in 21 Geo. 3, c. 60, s. 20, were even farther limited without there being anything in the statute to indicate that they should be read in a limited sense. The words were: "No action for wrong or injury shall lie in the Supreme Court, "against any person whatsoever exercising a judicial office in "the country courts, for any judgment, decree, or order of the "said court, nor against any person for any act done by or in "virtue of the order of the said court." Two limited readings were suggested—to exclude acts in mala fide or to exclude proceedings wholly without jurisdiction. In their Lordships' judgment it is said [12]: "It never could have been intended to give "such unlimited power to judges of the native courts, and reason "points out that the general words of the clause must be

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[11] 3 Moo.P.C. 28.

[12] Ibid. 75.

"qualified in the manner stated in one of the two latter modes "of construction." I think that there is still room for reason to point out that the general words in this case must be limited so as to accord with the principle, of which Parliament cannot have been ignorant, that a wrongdoer cannot rely on general words to avoid the consequences of his own dishonesty. As I have said, we must take this case on the footing that the appellant might allege deliberate dishonesty of the grossest kind.

It is said that Parliament may have intended that even cases of gross dishonesty should be excluded from redress because otherwise it would be embarrassing to deal with allegations of this kind after a long interval, and, if the case were proved, a local authority and ultimately the ratepayers might be involved in grievous loss. I am not entirely satisfied that the law is powerless to deal justly with such a situation. But, even if that were a possible consequence, I would hesitate to attribute to Parliament the view that considerations of that kind justify hushing up a scandal.

In my judgment this appeal should be allowed.

LORD RADCLIFFE. My Lords, I think that this appeal must fail except so far as the action against the defendant Pywell is concerned. As I understand that all your Lordships are agreed upon the latter point, I will confine what I have to say to the case against the defendants East Elloe Rural District Council, Ministry of Health and Ministry of Housing and Local Government.

The relief that the appellant seeks against them in her action depends wholly on her ability to establish that a compulsory purchase order dated August [26], 1948, made by the rural district council and confirmed by the Minister was invalid. I do not wish to beg any question by using the word "invalid." I mean that she has to show that in the eyes of the law this compulsory purchase order was not effective to confer upon the rural district council the authority to enter upon her land, which they certainly would not have possessed without the making of the order. It follows, therefore, that her action must stand or fall by her ability to question this compulsory purchase order in the legal proceedings.

But the act of questioning a compulsory purchase order in legal proceedings is what is dealt with under those very words in paragraphs 15 and 16 of Part IV of Schedule I of the Acquisition of Land (Authorization Procedure) Act, 1946: and the defendants say that having regard to the provisions of those paragraphs it is not open to the appellant by a writ issued in July, 1954, to question a compulsory purchase order made in August, 1948.

The provisions of the two paragraphs in question have been set out in full in the speech of the noble Lord on the Woolsack, and I do not repeat them. If, as is obvious, her proceedings are not within the brief measure of time allowed by paragraph 15, I am bound to say that I think that she faces a very great difficulty in showing that what appears to be the absolute prohibition, "shall "not . . . be questioned in any legal proceedings whatsoever," is to be understood in a court of law as amounting to something much less than such a prohibition. It is quite true, as is said, that these are merely general words: but then, unless there is some compelling reason to the contrary, I should be inclined to regard general words as the most apt to produce a corresponding general result.

Now, the appellant says that the reason for an exception being made in her case lies in the fact that, as her writ shows, she intends to establish that the compulsory purchase order in question was made and confirmed "in bad faith"; and that, when such a plea is raised, it is the duty of a court of law so to interpret the apparently general words used by Parliament as not to apply them to legal proceedings that are designed to determine that issue. It is because I do not think that the law either requires or entitles us to adopt such a method of construing an Act of Parliament that, in my opinion, the appellant's action must be stopped.

Of course, it is well known that courts of law have always exercised a certain authority to restrain the abuse of statutory powers. Such powers are not conferred for the private advantage of their holders. They are given for certain limited purposes, which the holders are not entitled to depart from: and if the authority that confers them prescribes, explicitly or by implication, certain conditions as to their exercise, those conditions ought to be adhered to. It is, or may be, an abuse of power not to observe the conditions. It is certainly an abuse of power to seek to exercise it when the statute relied upon does not truly confer it, and the invalidity of the act does not depend in any way upon the question whether the person concerned knows or does not know that he is acting ultra vires. It is an abuse of power to exercise it for a purpose different from that for which it is entrusted to the holder, not the less because he may be acting ostensibly for the authorized purpose. Probably most of the recognized grounds of invalidity could be brought under this head: the introduction of illegitimate considerations, the rejection of legitimate ones, manifest unreasonableness, arbitrary or capricious conduct, the motive of personal advantage or the gratification of personal ill-will. However that may be, an exercise of power in bad faith does not seem to me to have any special pre-eminence of its own among the causes that make for invalidity. It is one of several instances of abuse of power, and it may or may not be involved in several of the recognized grounds that I have mentioned. Indeed, I think it plain that the courts have often been content to allow such circumstances, if established, to speak for themselves rather than to press the issue to a finding that the group of persons responsible for the exercise of the power have actually proceeded in bad faith.

It must be assumed that the legislature which enacted the Acquisition of Land (Authorization Procedure) Act, 1946, was aware that the law protected persons disturbed by an exercise of statutory powers in that it allowed them to come to the courts to challenge the validity of the exercise on any of such grounds. But, if so, I do not see how it is possible to treat the provisions of paragraphs 15 and 16 of Part IV of Schedule I of the Act as enacting anything less than a complete statutory code for regulating the extent to which, and the conditions under which, courts of law might be resorted to for the purpose of questioning the validity of a compulsory purchase order within the protection of the Act. I should myself read the words of paragraph 15 (1), "on the ground that the authorization of a compulsory purchase "thereby granted is not empowered to be granted under this "Act," as covering any case in which the complainant sought to say that the order in question did not carry the statutory authority which it purported to. In other words, I should regard a challenge to the order on the ground that it had not been made in good faith as within the purview of paragraph 15. After all, the point which concerns the aggrieved person is the same in all cases: an order has been made constituting an ostensible exercise of statutory power and his purpose in resorting to the courts is to show that there is no statutory authority behind the order. I do not see any need to pick and choose among the different reasons which may support the plea that the authorization ostensibly granted does not carry the powers of the Act. But, even if I did not think that an order could be questioned under paragraph 15 on the ground that it had been exercised in bad faith, and I thought, therefore, that the statutory code did not allow for an order being questioned on this ground at all, I should still think that paragraph 16 concluded the matter, and that it did not leave to the courts any surviving jurisdiction.

The appellant's argument for an exception rests on certain general reflections which do not seem to me to make up into any legal principle of construction as applied to an Act of Parliament. It is said that the six weeks which are all the grace that, on any view, paragraph 15 allows an aggrieved person for his taking action, are pitifully inadequate as an allowance of time when bad faith, which may involve concealment or deception, is thought to be present. And indeed they are. Further, it is said that it would be an outrageous thing if a person who by ordinary legal principles would have a right to upset an order affecting him were to be precluded from coming to the courts for his right, either absolutely or after six weeks, when the order is claimed by him to have been tainted by bad faith. And perhaps it is. But these reflections seem to me to be such as must or should have occurred to Parliament when it enacted paragraph 16. They are not reflections which are capable of determining the construction of the Act once it has been passed, unless there is something that one can lay hold of in the context of the Act which justifies the introduction of the exception sought for. Merely to say that Parliament cannot be presumed to have intended to bring about a consequence which many people might think to be unjust is not, in my opinion, a principle of construction for this purpose. In point of fact, whatever innocence of view may have been allowable to the lawyers of the eighteenth and nineteenth centuries, the twentieth century lawyer is entitled to few assumptions in this field. It is not open to him to ignore the fact that the legislature has often shown indifference to the assertion of rights which courts of law have been accustomed to recognize and enforce, and that it has often excluded the authority of courts of law in favour of other preferred tribunals.

At one time the argument was shaped into the form of saying that an order made in bad faith was in law a nullity and that, consequently, all references to compulsory purchase orders in paragraphs 15 and 16 must be treated as references to such orders only as had been made in good faith. But this argument is in reality a play on the meaning of the word nullity. An order, even if not made in good faith, is still an act capable of legal consequences. It bears no brand of invalidity upon its forehead. Unless the necessary proceedings are taken at law to establish the cause of invalidity and to get it quashed or otherwise upset, it will remain as effective for its ostensible purpose as the most impeccable of orders. And that brings us back to the question that determines this case: Has Parliament allowed the necessary proceedings to be taken?

I am afraid that I have searched in vain for a principle of construction as applied to Acts of Parliament which would enable the appellant to succeed. On the other hand, it is difficult not to recall in the respondents' favour the dictum of Bacon: "Non est interpretatio, sed divinatio, quae recedit a litera."

LORD SOMERVELL OF HARROW. My Lords, objections to a compulsory purchase order by the vendor or other person aggrieved would, I think, normally fall under one or other of the following heads—(1) merits, (2) ultra vires, or (3) mala fides. There may be debatable frontiers.

So far as the merits are concerned, the Act provides for publication, notices and objections, if any. Objectors may be heard before a local inquiry or individually as provided in the Act. Subject to the procedures there laid down, the "merits" are finally decided by the local authority, subject to confirmation by the Minister.

Ultra vires and mala fides are, prima facie, matters for the courts. If the jurisdiction of the courts is to be ousted it must be done by plain words.

A good example of ultra vires came before the courts while this appeal was being argued. The Act of 1946 provides for a special parliamentary procedure if the land covered by the order is, inter alia, a common or open space. The local authority and the Minister had, bona fide, proceeded on the basis that the land was not a common or open space and had not, therefore, operated the special procedure. By the time the case came on the Minister conceded that the land covered was an open space and the order was quashed (*Richardson* v. *Minister of Housing and Local Government* [13]). Another example is *In re Ripon (Highfield) Housing Confirmation Order, 1938; White and Collins* v. *Minister of Health.*[14] There was no suggestion of bad faith.

Mala fides is a phrase often used in relation to the exercise of statutory powers. It has never been precisely defined as its effects have happily remained mainly in the region of hypothetical cases. It covers fraud or corruption. As the respondents have moved before the bad faith has been particularized, one must assume the worst.

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[13] The Times, Feb. 24, 1956.

[14] [1939] 2 K.B. 838; 55 T.L.R. 956; [1939] 3 All E.R. 548.

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It has been said that bad faith is an example of ultra vires, and observations to this effect are relied on by the respondents in support of their submission that the words "not empowered to be "granted" in paragraph 15 of Part IV of Schedule I to the Act cover cases where fraud or corruption is relied on, although on the face of it there is no irregularity. The following passage from Warrington L.J., as he then was, is perhaps the most favourable to this argument (*Short* v. *Poole Corporation* [15]): "My view then "is that the only case in which the court can interfere with an "act of a public body which is, on the face of it, regular and "within its powers, is when it is proved to be in fact ultra vires, "and that the references in the judgments in the several cases "cited in argument to bad faith, corruption, alien and irrelevant "motives, collateral and indirect objects, and so forth, are merely "intended when properly understood as examples of matters "which, if proved to exist, might establish the ultra vires "character of the act in question." This way of describing the effect of bad faith should not be used to blur the distinction between an ultra vires act done bona fide and an act on the face of it regular but which will be held to be null and void if mala fides is discovered and brought before the court. The division in law is clear and deep. No party would be allowed to raise fraud under an allegation of ultra vires simpliciter. In *Demetriades* v. *Glasgow Corporation* [16] the plaintiff complained of acts done on his land after requisition. He alleged, inter alia, that trees had been *unlawfully* cut. If there had been mala fides the cutting would, as I follow it, have been unlawful, but the House would not consider the possibility of bad faith in the absence of an express averment. This is stated by Lord Normand at the end of his opinion.[17] My noble and learned friend, Lord Morton of Henryton, said this [18]: "The position would be different if there "were any allegation of fact that the competent authority, "through his agents, the respondents, had acted in bad faith "and with some ulterior motive in carrying out this work on the "trees. The truth or falsity of such an allegation could be "investigated by a court of law." But no such investigation could take place in a case in which there was a claim for a declaration that the cutting had been unlawful.

In *Carltona Ltd.* v. *Commissioners of Works* [19] the writ

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[15] [1926] Ch. 66, 91; 42 T.L.R. 107.

[16] [1951] 1 T.L.R. 396; [1951] 1 All E.R. 457.

[17] [1951] 1 T.L.R. 396, 400.

[18] Ibid. 401.

[19] [1943] 2 All E.R. 560.

Lord Somervell of Harrow.

claimed a declaration that the Commissioners of Works were not entitled to take possession of the plaintiffs' premises and that a notice on which the commissioners relied was invalid. Lord Greene M.R. held bad faith could not be raised under a writ in this form. The words of paragraph 15 are plainly appropriate to ultra vires in the ordinary sense. They do not in their ordinary meaning, in my opinion, cover orders which "on the face of it" are proper and within the powers of the Act, but which are challengeable on the ground of bad faith. The wording of the paragraph itself supports this view. If mala fides is within the paragraph it must be within the earlier words "is not empowered "to be granted under this Act." These words do not apply to a certificate under Part III. If the paragraph was to cover mala fides it would have covered it in relation to a certificate as well as to an order. It has not done so.

This construction is strengthened by the context. The jurisdiction of the court under paragraph 15 is ousted after six weeks. If Parliament had intended that this should apply in the case of a person defrauded it would have made it plain, and not left it to be derived from a doubtful syllogism which would certainly not occur to a layman and would not, I think, occur ordinarily to a lawyer unless he happened to have had recently to familiarize himself with passages such as that I have cited from Lord Warrington.

The limited right under paragraph 15, therefore, does not apply to applications based on bad faith. Pausing there, the victim of mala fides would have his ordinary right of resort to the courts. It is said, however, that paragraph 16 takes away this right. In other words, Parliament, without ever using words which would suggest that fraud was being dealt with has deprived a victim of fraud of all right of resort to the courts, while leaving the victim of a bona fide breach of a regulation with such a right. If Parliament has done this it could only be by inadvertence. The two paragraphs fall to be construed together. Mala fides being, in my opinion, clearly excluded from paragraph 15, it should not, I think, be regarded as within the general words of paragraph 16. Construing general words as not covering fraud is accepted as right in many contexts. This seems to me an appropriate context for that principle. The Act, having provided machinery for access to the courts in cases of ultra vires, cannot have intended to exclude altogether a person defrauded. General words, therefore, should not be construed as effecting such an exclusion.

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